93-160

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ROBERT HAWKINS, PAMELA HAWKINS, RASHAWN HAWKINS, RODERICKA HAWKINS, RYAN HAWKINS, and ROBERT HAWKINS, JR.,

Petitioners,

vs.

PEOPLE OF THE STATE OF MICHIGAN *ex rel.* JOHN D. O'HAIR, Prosecuting Attorney,

Respondent.

Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS CASE BE REMANDED FOR FURTHER CONSIDERATION IN CONSEQUENCE OF THIS COURT'S RECENT RULING IN *AUSTIN V. UNITED STATES*?

II. WAS THE DECISION OF THE MICHIGAN COURT OF APPEALS INTERPRETING THE DUE PROCESS CLAUSE IN CONFLICT WITH DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS WHICH HAVE ADDRESSED THIS ISSUE, WHERE PETITIONERS WERE DENIED A TRIAL BEFORE A FAIR, IMPARTIAL AND NEUTRAL TRIER OF FACT?

III. IS THE DECISION OF THE MICHIGAN COURT OF APPEALS BELOW, THAT ONE FORFEITURE CLAIMANT MAY WAIVE ANOTHER FORFEITURE CLAIMANT'S RIGHT TO CHALLENGE AN UNLAWFUL SEARCH AND SEIZURE BY PROCEDURALLY DEFAULTING THIS ISSUE IN A DIFFERENT FORUM, A QUESTION OF MAJOR JURISPRUDENTIAL SIGNIFICANCE?

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No._____

In The

United States Supreme Court

October Term, 1993

Robert Hawkins, Pamela Hawkins,
Rashawn Hawkins, Rodericka Hawkins,
Ryan Hawkins and Robert Hawkins, Jr.

Petitioners,

v.

Wayne County Prosecutor's Office, and,
People of the State of Michigan.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

OPINIONS BELOW

The opinion of the Michigan Court of Appeals affirming the forfeiture below is dated May 4, 1992 and is published at 194 Mich. App. 134, 486 N.W.2d 326 (1992), which is reproduced as **App C, p. 5a**. The order of the

Michigan Court of Appeals denying rehearing is dated August 7, 1992 and is unpublished. It is reproduced as **App. B, p. 4a**. The order of the Michigan Supreme Court denying leave to appeal was entered May 14, 1993 and is published at 442 Mich. 904, ___ N.W.2d ___, 1993 Mich. LEXIS 1078 (1993), and is reproduced as **App. A, p. 1a**.

JURISDICTION

The decision of the Michigan Supreme Court denying leave to appeal (discretionary review) the Michigan Court of Appeals decision is dated May 14, 1993. This Court has jurisdiction pursuant to Title 28 U.S.C. §1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Am. I provides "the people shall have the right to petition the government for a redress of grievances.

U.S. Const. Am. IV provides "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

U.S. Const. Am. VIII provides "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S Const. Am. XIV provides, *inter alia*, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor

shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners apply for leave to appeal from the divided decision of the Michigan Court of Appeals, 194 Mich. App. 134, 486 N.W.2d 326 (1992), affirming a **Judgment of Forfeiture** of August 2, 1990 [**App. E, p. 32a**], obtained by Respondent, and from a **Supplemental Order of Forfeiture** dated August 10, 1990 [**App. D, p. 27a**], resulting from a **Complaint for Forfeiture** under Mich.Comp.L. §333.7421, *et. seq.*, filed May 10, 1989, a **First Amended Complaint** filed on May 19, 1989, and a **Second Amended Complaint** filed on January 16, 1990.

There was no arrest warrant *in rem*, and the only **Order of Seizure** in this matter was entered on May 12, 1989, naming only a 1988 Lincoln, a 1988 Tiffany automobile and a 1985 Bayliner 21-foot boat hull. None of the other property forfeited by the trial court was ever made the subject of an order of seizure or an *in rem* arrest warrant.

On May 10, 1989, an ***Ex Parte* Order Freezing Accounts** was entered, and on June 8, 1989, a **Stipulated Order Freezing Accounts and Assets** was entered. It named U.S. Currency, a Bloomfield Hills, Michigan, home, six cars, the boat, various banking and brokerage accounts, and a vague "Miscellaneous Items Named in a Return to a Search Warrant." Florida real property, the forfeiture of which was also sought, was only added in the Respondent's *Second* Amended Complaint, and was never subject to a seizure order, an *in rem* arrest order, or a "freeze order".

Petitioners filed timely discovery motions directed to Respondent's refusal to answer interrogatories and provide documents demanded, and to the refusal of Respondent's

witnesses to answer questions propounded at depositions. Petitioners also filed timely motions requesting (1) a jury trial; (2) a change of venue; (3) summary disposition; and (4) two separate motions to recuse the Trial Judge. Each motion was denied.

The State's investigation of the Petitioners started in August of 1988, when Petitioner ROBERT HAWKINS was arrested in the City of Detroit and charged with possession of 1/2 gram of cocaine. That case was disposed of by plea **without adjudication** under Mich.Comp.L. §333.7411, referred to informally as the "diversion" statute. In compliance with his obligation to the charging court, Mr. HAWKINS voluntarily disclosed to its probation department the assets which he and his wife had accumulated during the course of their lifetimes. In excess of $2,000,000.00 of the Petitioners' forfeited assets were derived from a personal injury lawsuit settlement concluded long prior to Mr. HAWKINS' arrest.

Mr. HAWKINS' financial disclosure, however, so intrigued the probation officer that he contacted the prosecutor's forfeiture division, which initiated an extensive investigation of Mr. HAWKINS solely on the basis of the assets which he acknowledged owning, and, it was claimed by Petitioners, because Mr. HAWKINS is an African-American "blue collar" worker then living in affluent, and predominantly white, Bloomfield Hills (Oakland County), Michigan.[1]

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[1] This remains unproven, because the trial court refused to allow examination of witnesses on issues related to this claim. *See*, Tr. 1/11/90, and Tr., 2/23/90, pp. 8, 10.

The Respondent's investigator, Francis Heaney, a trial witness, located documents in the Macomb County, Michigan, clerk's office attesting to the existence of the personal injury lawsuit previously filed by Mr. and Mrs. HAWKINS. The court file (admitted in evidence below) included a consent judgment for $750,000.00, which, according to trial testimony, represented the "final payment" of the settlement of that civil action.

The prosecutor's office (Respondent's counsel) uncovered *no criminal activities* on the part of any of the Claimants. But, still unsatisfied and undeterred nonetheless, they contacted the neighboring Oakland County's narcotics enforcement team ("N.E.T."), a joint federal–state drug task force, and requested yet a *second* investigation. N.E.T. initiated extensive surveillance of Mr. HAWKINS and of the home in Bloomfield Hills. That surveillance also disclosed *no criminal conduct*, only that Mr. HAWKINS regularly visited his elderly parents and other family members (as well as his 19 inner–city rental properties, never subjected to forfeiture, but lost by inattention after Mr. HAWKINS was jailed) in Detroit.

After the uneventful surveillance was concluded, the N.E.T. case was placed on inactive status. Even four "trash covers" (searches of all the rubbish left at the curb) failed to reveal *any* narcotics residue or *any* narcotics–related evidence *at all*. (Tr., 5/3/90, p. 48).

An informant, Randy Ulmer, had been in regular contact with a Michigan State Police Trooper, Detective David Bergsma, to whom he had been giving a stream of useless information for some ten years concerning an unrelated murder case. No action was ever taken as a result of any information which he provided. Despite the claim to

the contrary in Officer Sharpe's affidavit in support of the search warrant (*infra*), *no testimony* was adduced to suggest Ulmer had *ever given usable information*. Despite his notable record of non-achievement, the State Police listened when Ulmer claimed to know of a cocaine transaction allegedly conducted between one William Clemons and ROBERT HAWKINS, and the Police assigned Officer Jerome Sharpe[2] of N.E.T.

On May 9, 1989, Officer Sharpe, with the help of Investigator Heaney, prepared an **Affidavit (App. G, p. 41a)** in support of an application for a search warrant for the 4260 Lakeridge Court home in Bloomfield Hills, belonging to the Claimants. The Affidavit specifically claimed that HAWKINS' wealth had not been derived from "any lawsuit"[3] and contained other extensive factual inaccuracies as the testimony at the trial below later proved. For example, Ulmer admitted at trial to having *lied* about seeing "300-500 kilos" of cocaine at the HAWKINS' house. (Tr., Ulmer, 5/1/90, p. 60 *ff*). He did admit that, in fact, what he had seen was "about 6 or 7" packages which "*could have been*" kilos of cocaine. (Tr., Ulmer, 5/1/90, p. 14). Ulmer was injecting cocaine intravenously "every day" during the time in April and May of 1989, when he was giving this "information" to the police. (Tr., Ulmer, 5/1/90, p. 36). He was also regularly using heroin and "speedballing" (heroin and cocaine loaded

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[2] Later promoted apparently for his vigorous, if not honorable, conduct in this case, Sharpe later became an agent of the United States Department of Alcohol, Tobacco and Firearms.

[3] Interesting because of later revelations Heaney made at trial that he *did* know of the suit but "didn't believe" it.

into the same hypodermic and shot together into the vein). (Tr., Ulmer, 5/1/90, p. 40).

Although the Affidavit *claimed* Ulmer had seen "numerous drug transactions" at the HAWKINS' house prior to May 7, 1990, each "in excess of two kilos", Ulmer specifically testified at trial that he *never* saw *any* drug transactions between HAWKINS and anyone else at the house or elsewhere prior to the claimed incident in question, (Tr., Ulmer, 5/1/90, p. 44), involving *any* drugs.

Despite the fact that he had previously testified in Mr. HAWKINS' August and September, 1989, criminal trials in federal court that there was a steel door (that testimony proved never existed) protecting a "secret room" (that testimony proved never existed) in which the purported 300–500 kilos (that *his* testimony also revealed never existed) were "hidden", (Tr., Ulmer, 5/1/90, pp. 57, 58),[4] the trial judge nonetheless embraced his testimony as fully worthy of belief. (Tr., 07/23/90, p. 49).

Ulmer admitted (Tr., Ulmer, 5/1/90, pp. 61–62) that he also *lied under oath* at Mr. HAWKINS' federal trials (*infra*) when he testified that he had seen "hundreds of kilos" of cocaine in the basement of HAWKINS' house. In fact, the only time he was in the HAWKINS' residence was, as he finally admitted under oath, "a week or two" *prior* to his contacting Detective Bergsma (Tr., Ulmer, 5/1/90, pp. 19–20, 64). That date was confirmed by Agent Sharpe as having

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[4] The testimony from all of the officers who participated in the raid clearly revealed that there *was* no "steel door", and there *was* no "hidden room" in the basement of the HAWKINS' house.

been May 9, 1989. (Tr., 5/3/90, p. 75).[5] At that time, William Clemons purportedly had Ulmer carry a brown grocery bag into Mr. HAWKINS' house, and leave with a box which Ulmer *believed* may have had cocaine in it. (Tr., Ulmer, 5/1/90, pp. 66–67). Ulmer admitted, however, that what he carried *out* of Mr. HAWKINS' house in the box may very well have been what he and Mr. Clemons had carried *into* Mr. HAWKINS' house (Tr., Ulmer, 5/1/90, p. 67) that day.

Ulmer claimed (Tr., Ulmer, 5/1/90, pp. 72–73) that he believed he is to get 10% of everything that is forfeited in this matter, which he expected to be about a million or so dollars, or $100,000.00 for him, but still claimed that the money "don't make no difference to me. Money has, you know, has no value. . . ." (Tr., Ulmer, 5/1/90, p. 51). Ulmer claimed that he and that he went to the police about HAWKINS only because he "was a good citizen and wanted to stop drugs." *Id.*

Despite all of the later–discovered inconsistencies, lies and inaccuracies, Agent Sharpe's affidavit and application got him his search warrant for the HAWKINS' residence. The search warrant was executed in the very early morning hours of May 10, 1989, and resulted in the seizure of *no*

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[5] Since Ulmer's visit there was "one to two weeks" earlier (Tr., 5/1/90, p. 59), that would have made it May 2, 1989, or April 25, 1989. In either event, Sharpe lied again in the Affidavit when he claimed the "confidential informant" (i.e., Ulmer) had been in the HAWKINS' house "two *days*" before May 9, 1989. **See App. G, p. 42a.**

measurable quantities of cocaine or any other illegal substances.[6]

Despite Ulmer's unabashed admissions of perjury in court and "exaggeration" to law enforcement officers (Tr., Ulmer, 5/1/90, p.60), the trial court, in its zeal to forfeit all of the Claimants' assets, gave the following astonishing assessment of Ulmer: "*he answered in this Court's judgment intelligently, but more importantly, clearly, concisely, honestly in this Court's judgment, credibly and accurately.*" (Tr., July 23, 1990, p. 49). Remember, this was an admitted liar, perjurer and long-term drug addict under the influence at all relevant times. Even the Court of Appeals below had trouble accepting his "questionable testimony". 194 Mich. App. at 150; 486 N.W.2d at 335.

Throughout the trial below[7] and all pretrial matters,

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[6] The only "contraband" allegedly found was a small amount of residue purportedly obtained by shaking some containers of cash and shaking some of the cash itself; if the DEA can be believed, its own chemists had *previously* determined that traces of cocaine can be found on "one-third of a randomly selected sample" of currency in general circulation. *See*, Report of Sanford A. Angelos, Forensic Chemist, and David W. Parmalee, Supervising Chemist, North Central DEA Laboratory, based on the analyses by Robert Bianchi, Chief of the DEA's Northeast Lab, in a study dated February 15, 1989, suppressed for years by the DEA, but involuntarily revealed in this case and others.

[7] The trial lasted 13 full days, but extended over nearly three months (from May 1, to July 23, 1990) because the trial (continued...)

the trial court comported itself in such a manner as to necessitate two separate motions to recuse filed by Petitioners as well as a third request for recusal contained in the Petitioners' motion for new trial.

(a) The trial court refused to require Respondent to provide a Witness List at least two months before completion of discovery (provided just three working days before trial), despite that two months is mandated by Local Rules;

(b) He allowed Respondent to offer 268 exhibits during trial, despite *no* List of Exhibits was provided until the day of trial, when 60 exhibits were identified on a list and supplemented over the ensuing weeks;

(c) He was unreasonably abusive and grossly unfair toward Petitioners' witnesses and counsel (see dissenting opinion of Chief Judge Doctoroff, Michigan Court of Appeals);

(d) He forfeited property of *innocent owners, i.e.,* the wife and children, on the court's own *sua sponte* manufactured claim that the wife "must have known" of her husband's illicit activities (though they were never delineated, much less proven);

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[7](...continued)
judge refused to schedule time for what Petitioners had insisted from the outset would be a two-week trial.

(e) He ignored Michigan's two-year statutory time bar for initiation of forfeiture actions (Mich.Comp.L. §600.5809);

(f) He denied Petitioners a trial by jury despite Michigan's constitutional requirement for a jury trial except where statutorily prohibited [Mich. Const. Art 1, §14 ("The right of a trial by jury shall remain but shall be waived in all civil cases *unless demanded by one of the parties* in the manner prescribed by law")];

(g) Even more troubling perhaps, during the course of the trial, and specifically on June 28, 1990, *the trial court was actively engaged upon an effort to secure employment with the Federal Government in the Office of Substance Abuse, the "Drug Czar's" office,* as reflected in a letter dated June 28, 1990 (**App. F, p. 38a**). This was the basis for the third recusal request;

(h) The trial court *admittedly* executed Respondent's trial subpoenas, for *ex parte* discovery, *with no notice whatsoever* to Petitioners. (Respondent's counsel regularly issued its own trial subpoenas for *ex parte* discovery, some of which specifically cautioned the recipient from talking to "anybody" regarding the subpoena or revealing

the subpoenaed information to anyone else);[8]

(i) While admitting that Michigan's forfeiture statute (modeled after its federal counterpart) does require proof of "a substantial connection between the *res* and the specific conduct or the claimed criminal behavior", the trial court announced that that does "not have to be [a] specific event. These the People cannot always show, nor do they have to show. The People have to demonstrate by way of a net worth theory derivative conduct of a violation of the [drug] statute. And in this case practically all of the assets and cash, purported income, comes from, in this court's judgment, violations of the Public Health Code" (Tr., 7/23/90, p. 56).[9]

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[8] The Court of Appeals ruled that, although Petitioners had been entitled to notice, and although Respondent's "conduct [regarding the secret subpoenas] was reprehensible" in depriving Petitioners of notice, the conduct was still harmless error.

[9] The court, however, gave *no* specifics other than the single claimed "drug transaction" purportedly witnessed by Ulmer. The minuscule traces of cocaine shaken from currency found in the house and containers holding the currency were amply explained by the testimony of Dr. Jay Marshal Poupko, whose testimony revealed that most U.S. Currency in circulation is tainted with trace amounts of narcotics, at least sufficient for a narcotics-trained canine to alert or detect. *See*, May 4, 1990, stipulated Deposition of Dr. Jay Marshal Poupko.

The trial court announced its holdings on July 23, 1990, declaring forfeit each and every asset requested to be forfeit by the Plaintiff State of Michigan, *including an annuity insurance policy which had never even been named as a Defendant.* The court's decision abjectly ignored all claims of the innocent wife and children, thus compounding the due process violations.

A timely motion for new trial was filed by Petitioners, which, on August 24, 1990, was denied by the trial court, without allowing oral argument. (The court's unreasonable outrage at having been caught bragging about his forfeiture "record" while he was supposed to be an impartial arbiter of the facts, is evident in the transcript. *See, e.g.*, Tr., 8/24/90, p. 19.) This appeal was timely filed thereafter to the Michigan Court of Appeals.

On May 4, 1992, the Court of Appeals affirmed the trial court in a published opinion, **App. C, p. 6a** (and reversed in part relative to a condominium in Florida, as to which the court below held there existed; *Id*, at p. 9a). Chief Judge Martin Doctoroff, however, dissented from the opinion, finding specifically that Judge Talbot *was biased against the Petitioners* (evidenced by the conduct listed *supra*, and particularly because of the job-seeking letter), and that venue was obviously improper in Wayne County. And, on the venue issue, Chief Judge Doctoroff specifically urged the Appellant's to appeal to the Supreme Court. On August 7, 1992, rehearing was denied over Judge Doctoroff's dissent. **App. B, p. 4a**.

The Michigan Supreme Court denied leave to appeal on May 14, 1993 (**App. A, p. 2a**), with no comment but for the dissenting justices' notation that they "would grant leave

for the reasons set forth in the dissenting opinion of the Chief Judge of the Court of Appeals", *Id.*, at 2a, 3a.

This Petition follows.

REASONS FOR GRANTING WRIT

I. THIS CASE SHOULD BE REMANDED FOR FURTHER CONSIDERATION IN CONSEQUENCE OF THIS COURT'S RECENT RULING IN *AUSTIN V. UNITED STATES*.

Petitioners ask this Court to remand this matter for further consideration in consequence of this Court's ruling in *Austin v. United States*, 509 U.S. ___; ___ S.Ct. ___; ___ L.Ed.2d ___; 53 CrL 2274; 1993 U.S. LEXIS 4407(1993), which held that an excessive forfeiture can violate the Eighth Amendment's prohibition against excessive fines.

The parties stipulated at trial to a time line tracing of all assets seized. As much as six or seven years had passed prior to the initiation of the forfeiture action. 194 Mich. App. at 139; 406 N.W.2d at 330. The trial court opined that "records" found in the house suggested evidence of as much as 69 kilos of cocaine (Tr., 7/23/90, pp. 52, *et. seq.*), at $15,000/kilo (*Id.*), or $1,035,000.00, almost exactly the amount of cash seized at the house. Even if so, then *all the other bank accounts, security accounts and assets forfeited bore no relationship whatsoever to any claimed criminal activity*. Forfeiture of them, therefore, clearly violated the Eighth Amendment's Excessive Fines Clause.

Petitioners recognize that they did not raise this issue below, but urge this Court to overlook any claimed procedural default, given the late date on which *Austin* was released, and the clearly excessive forfeiture below. *Austin* revealed an approach which had been previously rejected by virtually all circuits which had considered it. In such a situation, raising the issue below would have been futile. In

Reed v. Ross, 486 U.S. 1; 104 S.Ct. 2901; 82 L.Ed.2d 1 (1984), this Court recognized that novelty can well be an excuse for failing to raise an issue below: "Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a [litigant] has cause for his failure to raise the claim in accordance with applicable state procedures [as where the] state of the law at the time of the [original] appeal did not offer a 'reasonable basis' upon which to challenge [the issue]". *Id.*

Additionally, Petitioners effectively raised the *substance* of this issue in any event through their repeated arguments that there must be a substantial connection between the *res* and the alleged activity on which a forfeiture is based, and by arguing that virtually all the assets forfeit were traceable (as set out in the *stipulation* between the parties below) to *many* years *prior* to the events upon which the Respondent claimed forfeiture should be based, and that it was unreasonable to forfeit the assets of innocent parties because of the claimed criminal misadventures of another.

II. THE DECISION OF THE MICHIGAN COURT OF APPEALS INTERPRETING THE DUE PROCESS CLAUSE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS WHICH HAVE ADDRESSED THIS ISSUE, IN THAT THE PETITIONERS WERE DENIED A TRIAL BEFORE A FAIR, IMPARTIAL AND NEUTRAL TRIER OF FACT.

In state court, Petitioners argued that they were denied a right to a fair hearing within the meaning of the due process clause of the Fourteenth Amendment where the trial

judge (a) while trying state asset forfeiture case, had campaigned for a job as a federal drug enforcement official relying on the amount of assets he had forfeited as proof of his commitment to the "war on drugs," and, (b) treated Petitioners, Petitioners' counsel, and Petitioners' witnesses with hostility and assumed the functional role of an additional prosecuting attorney in his control of the trial. For these reasons, Petitioners urge this Court to either agree to hear this case or alternatively to remand the matter to the state court for further proceedings.

A. *The Ruling of the Michigan Court of Appeals that an Indirect Financial Interest in an Action is Not Grounds for Judicial Disqualification is in Conflict With the Decisions of this Court and Lower Federal Courts Which Hold that it Is.*

Petitioners ask this Court to reverse the Michigan Court of Appeals' affirmation of the trial judge's refusal to disqualify himself. As Chief Judge Doctoroff of the Court of Appeals recognized in his dissenting opinion below, the trial judge "was biased or predisposed against claimants and their attorneys and the trial court was influenced by personal interest." 194 Mich App at 157; 486 N.W.2d at 338. As this Petition and the record below clearly demonstrate, the majority opinion below fails to recognize that the trial judge had been acting under a *personal economic interest* in this case. This places the ruling below in conflict with decisions of this Court, which hold that, even an *indirect* economic interest in a case constitutes grounds for disqualification. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813; 106 S.Ct. 1550; 89 L.Ed.2d 823 (1986).

On June 28, 1990, during one of the many breaks in the proceedings (from late May to early July, 1990), the trial judge mailed an unsolicited letter to the Office of Presidential Personnel (**App. F, p. 38a**), in which he sought "a position at the federal level" (*Id.*, at 39a) based on his self-proclaimed experience, reputation and accomplishments in fighting the "war" on drugs. The judge wrote that he wanted to even "more actively contribute to defeating the scourge of drugs. . . ." (*Id.*) This is the antithesis of impartiality or neutrality. In the same letter, the judge actually proclaimed himself to be a "*partisan*" and "*activist*" rather than the passive, neutral and impartial fact-finder he was supposed to be.

The trial judge also refused to recuse himself based on the request in the motion for new trial that contained his "White House" employment application letter. It is impossible to imagine a circumstance in which Petitioners could have had a fair forfeiture trial in that court even, if the judge had allowed a jury trial, when a finding for the plaintiff (Respondent) held such great potential for enhancement of the judge's self-proclaimed record of forfeiture successes he boasted of in the letter. ("For over three years I also had exclusive responsibility for all drug asset forfeiture cases in this county [resulting] in the. . .seizure of approximately eighteen million in cash and assets". *Id.* at 39a.) The trial judge had kept a running tally of the aggregate value of assets he forfeited, as evidenced by the letter itself, *Id* (as well as by numerous television and print interviews he had given).

The inherent bias of the trial judge against these Petitioners was also self-evident in his reaction to their motion for new trial, which raised, ***inter alia***, the issue of the letter. At hearing, the trial court engaged in thinly-veiled threats against Counsel for the Petitioners by suggesting that,

because of the public exposure of the judge's indiscretion, "this court may be here for a long, long time as a result of the letter becoming public. . . ." (Tr., 8/24/90, p. 19).

Also because of the public disclosure of the judge's indiscretions, and his undisguised outrage at having been exposed, the judge *sua sponte* decided to make "*new* findings and conclusions" that the claims made by Petitioners had been predicated upon "fraud". (Tr., 8/24/90, p. 20).

The Court of Appeals majority erred by failing to recognize that the trial judge had an obvious economic interest in the case when he bragged about the aggregate dollar amount of assets he forfeited to prove his fitness for a job as an assistant federal drug czar. The majority instead ruled that he was not biased against counsel "*despite*" his treatment of counsel, and his letter to the White House. *Id.* The appellate court found that even the judge's admission of a personal desire to "fight the war on drugs" would not make him unfit to hear the case. In reaching this ruling, the majority ignored the fact that the judge was seeking a job based on his track record in forfeiting property. As such, he clearly had an indirect financial interest in the outcome of this case.

As Chief Judge Doctoroff plainly noted in the dissent: the letter "*calls into question the judge's true reasons for denying claimants' motion to change venue and challenging jurisdiction over the Florida property. The trial court's actions support claimants' assertion that Judge Talbot was biased or predisposed against claimants and their attorneys and that the trial court was influenced by personal interest.*" 194 Mich. App. at 157; 486 N.W.2d at 338 (**App. C, p. 26a**).

Where a judge has an indirect financial interest in the outcome of the case, due process mandates that he be barred from hearing the case. In *Aetna Life Ins. Co., supra*, this Court held that an Alabama Supreme Court Justice erred in sitting on a panel which heard a case where that judge had a similar issue pending in his own suit before a lower court at the time. Because of the "judicial temptation" to render a ruling supporting the position in which the judge himself had a stake, it was error for him to remain on the bench, this Court held. Proof of actual bias is not required, it is the *potential* for bias which mandates disqualification:

> We conclude that Justice Embry's participation in this case violate appellant's due process rights. . . .We make clear that we are not required to decide whether in fact Justice Embry *was* influenced, but only whether sitting on the case then before the Supreme Court would offer a *possible temptation* to the average judge to lead him not to hold the balance nice, clear, and true. *The due process Clause may sometime bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties*. But to perform its high function in the best way, "justice must satisfy the appearance of justice." [Emphasis added].

475 U.S. at 825.

While proof of the trial court's *actual* bias is not required, this Court has specifically examined the substance of the lower court ruling to determine whether a ruling in favor of the other party on critical issues was a distinct

possibility. In *Aetna*, this Court noted that the lower court ruling had been 5–4, and that its ruling was "not completely harmonious" with past precedent of the Alabama court on the same issue. For this reason, this Court believed that the *appearance* of justice had not been satisfied. *See, also, Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847; 108 S.Ct. 2194; 100 L.Ed.2d 855 (1988).

Here, a different judge could (and likely would) have ruled in a very different manner on numerous issues, including requiring timely witness and exhibit lists; rejection of the notion of collateral estoppel as to the *non-mutual* parties in this matter (something never before or since permitted in any published Michigan appellate decision); appropriate discovery sanctions; what discovery to which Petitioners were entitledo; whether to grant the obviously needed change of venue;[10] and many others. Even the Court of Appeals majority recognized, at least inferentially, ***that the opposite of most of the judge's "discretionary" rulings would have withstood appellate scrutiny***, an interesting admission from a divided court.

While it is true that the trial judge's financial interest in this matter was in an appointment to a high federal position, and not the outcome of an unrelated lawsuit as in

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[10] The majority in the Court of Appeals below admitted *venue was improper* and that the objection had been timely raised (194 Mich. App. at 140; 486 N.W.2d at 331; **App. C, p. 9a**), but unilaterally imposed a theretofore unheard of requirement of *interlocutory appeal* in order to preserve the issue. (*Id*). An interlocutory appeal on venue? Imagine the implications of such a rule on court dockets around the Country.

Aetna, or in the financial interest of a position on a corporation's board as in *Liljberg*, the interest in this drug czar job was more than enough to violate the applicable ethical and due process standards. *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985), where a retiring judge should have recused himself where his placement "headhunter" mistakenly contacted law firms representing opposing parties in an antitrust action pending before him about possible employment of the judge after retirement.

Contrary to the holding of the majority below, the record and the state of the law and ethics in this Country amply demonstrate both the *likelihood* of bias and the *appearance* of bias, even when examined in the light most favorable to the trial court.

B. *Approval by the Michigan Court of Appeals of the Trial Judge's Hostile Treatment of Petitioners, their Witnesses and Counsel, is in Conflict with Minimal Standards of Due Process.*

As Chief Judge Doctoroff recognized in his dissent in the Michigan Court of Appeals, the trial judge's treatment of witnesses and counsel proved his bias against Petitioners. Both the appearance of justice and justice itself mandate a reversal or, at the very least, a new trial.

Despite his hollow protestations to the contrary during the course of his opinion placed on the record on July 23, 1990, the trial judge regularly acted as *inquisitor and prosecutor* in cross examining Petitioners' witnesses and the

Petitioners. The judge did not simply conduct "honest inquiry" of witnesses as would be his prerogative, and by which justification it sought to explain its conduct; instead, he went out of his way to buttress Respondent's witnesses and testimony and to rehabilitate them whenever their testimony supported the Petitioners' position. *Cf Berger v. New York*, 255 U.S. 22; 65 L.Ed. 481; 41 S.Ct. 230 (1921). As Chief Judge Doctoroff noted in his dissent below:

> *The trial court's questioning of the people's witnesses appears to have been intended to elicit testimony favorable to the people's position, whereas the trial court's questioning of claimants' witnesses seems to have been intended to intimidate the witnesses*. The trial court made *sarcastic comments* regarding some of the claimants' witnesses, further indicating its bias against claimants. *In many instances, the trial court treated claimants or their attorneys with contempt*. [Emphasis added].

194 Mich. App. at 156, 157, 486 N.W.2d at 337.

While Petitioners recognize that a judge is not under a constitutional duty to remain silent and may question witnesses (*Quercia v. United States*, 289 U.S. 466; 53 S.Ct. 689; 77 L.Ed. 1321 (1933)), he does have a duty to behave in a fair manner (*United States v. De Laughter*, 453 F.2d 908 (5th Cir. 1972); *Herman v. United States*, 289 F.2d 362 (5th Cir. 1961)), and not be the champion of one side's cause. *See, Franano v. United States*, 310 F.2d 533 (8th Cir. 1962); *Sit-Set, A.G. v. Universal Jet Exchange*, 747 F.2d 921 (4th Cir. 1984).

The following few examples briefly illustrate and typify the trial judge's mistreatment of Petitioners:

* He engaged in unreasonably, cynical and sarcastic treatment of counsel during cross-examination. *See, e.g.*, Tr. 5/2/90, pp. 27, 102.

* He interfered with Petitioners' counsels' presentation of their theory. Tr., 5/2/90, pp. 113-115.

* He constantly rehabilitated prosecution witnesses. *See, e.g.*, Tr. 5/2/90, pp. 192-193; Tr. 5/3/90, pp. 79, 80, 81.

* He refused to rule on Petitioners' objections. *See, e.g.*, Tr. 5/3/90, pp. 8, 35-36.

* He intimidated Petitioners' witnesses. *See, e.g.*, Tr. 7/17/90, pp. 135, *et. seq.*

* He belittled Petitioners' witnesses on and off the stand, including an intellectually disadvantaged witness. *See, e.g.*, Tr. 7/17/90, p. 135. *See, also* Tr. 7/19/90, pp. 157, *et. seq.*

* He *sua sponte* warned Petitioners' witnesses about the "penalty for perjury", even where the witness was only a notary public testifying that she was the one who signed a document, *see, e.g.*, Tr. 7/18/90, p. 99, while never warning prosecution witnesses, such as Agent Sharpe, whose testimony had *already* been directly repudiated by other prosecution witnesses, *i.e.*, Randy Ulmer.

A thorough review of the trial transcript, juxtaposed with the trial judge's boasts about his own forfeiture "record" at the time while seeking a coveted federal drug enforcement job, make strong evidence that the State of Michigan did not provide the Petitioners with a trial before a neutral and detached fact-finder, but instead before a financially-interested and obviously biased advocate. For these reasons, as well, the decision of the Michigan Court of Appeals should be reviewed.

III. THE DECISION OF THE COURT OF APPEALS BELOW THAT ONE FORFEITURE CLAIMANT MAY WAIVE ANOTHER FORFEITURE CLAIMANT'S RIGHT TO CHALLENGE AN UNLAWFUL SEARCH AND SEIZURE BY PROCEDURALLY DEFAULTING THIS ISSUE IN A DIFFERENT FORUM, IS A QUESTION OF MAJOR JURISPRUDENTIAL SIGNIFICANCE.

The trial court ruled, and the Michigan Court of Appeals agreed, that one forfeiture claimant (the husband, here) may waive the right of other forfeiture claimants (the wife and children) to challenge the validity of a search and seizure issue by failing to timely raise the issue in a related *federal* criminal proceeding against only the husband. **App. C, pp. 13a, 14a**. This ruling violates the spirit and letter of this Court's ruling in *Franks v. Delaware*, 438 U.S. 154; 98 S.Ct. 2674; 57 L.Ed.2d 667 (1978), and *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693; 855 S.Ct. 1246; 14 L.Ed.2d 170 (1965). *Franks* holds that, where a party makes a specific challenge to a search warrant on the grounds that it contains statements which are either knowingly false or made with reckless disregard of the truth, the exclusionary

rule will invalidate the warrant. *1958 Plymouth* holds that the exclusionary rule is applicable to forfeiture actions. *Accord, Boyd v. United States*, 116 U.S. 616; 6 S.Ct. 1524; 29 L.Ed. 746 (1886).

Subsequent to the execution of the search warrant, and based on the evidence seized, Petitioner ROBERT HAWKINS was charged in United States District Court (Eastern District of Michigan) with possession with intent to distribute cocaine; possession of firearms in the course of a drug trafficking crime; and being a felon in possession of firearms. In August, 1989, he was convicted of count III only, with a deadlocked jury on the other two counts. A re-trial on those counts in September, 1989, resulted in HAWKINS' conviction, all convictions, of course, having been based on *Ulmer's later-recanted testimony*.

During the federal trial, HAWKINS' counsel objected to the admissibility of evidence seized during the execution of the search warrant. No formal motion to suppress nor for an evidentiary hearing was ever presented, nor was there ever a formal hearing conducted. However, the district court judge admitted the results of the search into evidence over objection.

In the trial below, counsel for Petitioners moved for suppression of the evidence and for an evidentiary hearing. The trial court refused to provide an evidentiary hearing or consider the motion on his claim that the federal judge's admission of the evidence over objection during trial constituted "collateral estoppel" or "*res judicata*" of the issues regarding the constitutionality of the search and of the warrant.

Even though no Petitioner other than Robert Hawkins, was a party to the "original action", *i.e.*, the federal criminal case, and even though the federal judge found that Mr. Hawkins' procedural default (*i.e.*, not filing a motion to suppress) in the criminal case constituted a waiver of the issue, the Michigan courts below gave that federal ruling full preclusive effect and refused to allow any other party the right to challenge the validity of the search.

A similar issue was addressed in *United States v. Schmidt*, 604 F.2d 236 (3rd Cir. 1979). There, the United States attempted to argue that, where a defendant lost a search and seizure issue, the co-defendant was thereby barred under collateral estoppel from pursuing the same motion. The Third Circuit reversed the district court, holding:

> [I]t is elemental that *a defendant may not be denied a suppression hearing solely on the basis of a previous hearing to which the defendant was not a party*, unless there is a showing that the defendant had stipulated to or acquiesced in the trial court's reliance on the transcript of the prior hearing. 604 F.2d at 237. [Emphasis added].

Indeed, in a case compellingly similar to the one at bar, where a husband and wife were indicted for transporting firearms in violation of the Federal Firearms Act, they sought to suppress certain physical evidence. All counts of the indictment against the wife were dropped, so that the suppression hearing only involved her husband. The indictment was subsequently dismissed as to the husband as well, but the defendants were later reindicted and again moved to suppress. The trial court denied that motion, holding that the issue had already been decided in the prior

hearing. *United States v. Thoresen*, 428 F.2d 654 (9th Cir. 1970). On appeal, the Ninth Circuit Court of Appeals held that the wife *could not be denied a suppression hearing on the basis of the earlier hearing to which she had not been a party unless there was a showing that she had agreed to be bound by that hearing. Id.* at 667.

The United States Supreme Court reversed a state conviction where a state court denied the defendant a hearing to determine the obscenity of a book, holding that that issue had previously been determined in a civil proceeding *to which the defendant had not been a party. McKinney v. Alabama*, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976). This Court held that the defendant was entitled to his own hearing on the issue *since he was neither party nor privy to the other proceeding.*

Here, a contrary rule was unfairly crafted by the courts below, even though neither the wife nor any of the children -- nor the State of Michigan, for that matter -- was a party to the original proceedings and would not have been bound by the federal judge's ruling as to the husband, since she was not a party to the prioer proceeding, nor in privity with the party to it. *See, also United States v. McConnell*, 903 F.2d 566 (8th Cir. 1990); *United States v. Safari*, 849 F.2d 891 (4th Cir. 1988); *United States v. Bonilla Romero*, 836 F.2d 39, 43 (1st Cir. 1987). This Court may also take judicial notice that Federal Rules of Criminal Procedure do not provide any mechanism by which Mrs. Hawkins or the Hawkins children could have intervened in Mr. Hawkins' criminal case in order to challenge the search and seizure issue in that forum. This Court should agree to hear this issue, and reverse the State decision below, thus protecting the rights of citizens to seek redress individually from the courts. U.S. Const. Am. I; Am. XIV.

RELIEF REQUESTED

For all of the reasons stated above, Petitioners request this Court issue a writ of certiorari or alternatively remand this matter for further proceedings in the Michigan Court of Appeals.

Respectfully submitted,

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Attorney for Petitioner Robert Hawkins

Dated: July _____, 1993

APPENDIX A — MICHIGAN SUPREME COURT ORDER ENTERED MAY 14, 1993

Michigan Supreme Court
Lansing, Michigan

Order
Entered: May 14, 1993

94686 & (89) (95) (99)

SC: 94686
COA: 133003
LC: 89-909769-CZ-113

PEOPLE OF THE STATE OF MICHIGAN, ex rel JOHN D. O'HAIR, Prosecuting Attorney,

Plaintiff-Appellee, Cross-Appellant,

v

$1,159,420.00 U.S. CURRENCY; THE RESIDENCE AND CONTENTS THEREOF LOCATED AT 4260 LAKERIDGE COURT, BLOOMFIELD HILLS, MICHIGAN; A 1988 LINCOLN, VIN #1LNBM9847JY854670; A 1988 TIFFANY, VIN #1MEBM60F3JH629001; A 1985 BAYLINER BOAT, HULL #2150CIERASUNBR; A 1986 ROLLS ROYCE, VIN #SCZN42A3GCX14193; A 1989 JEEP, VIN #1J4FJ78L6KL426978; A 1988 JAGUAR, VIN #SAJKV1644JC522514; A 1988 DODGE, VIN #1B4FK5031JX205053; MISCELLANEOUS BANKING AND BROKERAGE ACCOUNTS; MISCELLANEOUS ITEMS NAMED IN A RETURN TO A SEARCH WARRANT, AND A PARCEL OF REAL PROPERTY AND THE CONTENTS THEREOF LOCATED AT 7335 N.W. 52ND COURT, LAUDERHILL, FLORIDA,

Defendants,

Appendix A

and

ROBERT HAWKINS, PAMELA HAWKINS, RASHAWN HAWKINS, RODERICKA HAWKINS, RYAN HAWKINS and ROBERT HAWKINS, JR.,

Claimants-Appellants, Cross-Appellees.

On order of the court, the application for leave to appeal and the delayed application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to permit a foreign attorney to appear *pro hac vice* is GRANTED. The motion for leave to file a supplemental brief is GRANTED.

Mallett, Jr., J., not participating.

Levin, J., states as follows:

I would grant leave to appeal for the reasons set forth in the dissenting opinion of the Chief Judge of the Court of Appeals[1] who said:

> "During the course of the trial, the trial court engaged in extensive questioning of witnesses. The trial court's questioning of the people's witnesses appears to have been intended to elicit testimony favorable to the people's position, whereas the trial court's questioning of claimants' witnesses seems to have been

1. 194 Mich App 134, 157 (1992).

intended to intimidate the witnesses. The trial court made sarcastic comments regarding some of claimants' witnesses, further indicating its bias against claimants. In many instances, the trial court treated claimants or their attorneys with contempt. I disagree with the majority's conclusion that the letter sent by Judge Talbot to the federal government does not indicate that Judge Talbot would unfairly decide a case. The letter calls into question the judge's true reasons for denying claimants' motions to change venue and challenging jurisdiction over the Florida property. The trial court's actions support claimants' assertion that Judge Talbot was biased or predisposed against claimants and their attorneys and that the trial court was influenced by personal interest. I would hold that the trial court's conduct denied claimants a fair trial."

Cavanagh, C.J., concurs in the dissenting statement of Levin, J.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 14, 1993

s/ Jacqueline B. Mac Kinnor
Deputy Clerk

APPENDIX B — MICHIGAN COURT OF APPEALS ORDER DENYING REHEARING ENTERED AUGUST 7, 1992

Court of Appeals, State of Michigan

ORDER

People v. One Million Dollars	Richard Allen Griffin Presiding Judge
Docket #133003 L.C. #89 909769 CZ 113	Martin M. Doctoroff Thomas J. Brennan Judges

The Court hereby orders that the motion for rehearing is DENIED.

s/ Richard Allen Griffin
Richard Allen Griffin
Presiding Judge

Judge Doctoroff would grant.

A true copy entered and certified by Ella Williams, Chief Clerk on

AUG 7 1992	s/ Ella Williams
Date	Chief Clerk

APPENDIX C — OPINION OF THE STATE OF MICHIGAN COURT OF APPEALS DATED MAY 4, 1992

STATE OF MICHIGAN
COURT OF APPEALS

May 4, 1992
9:45 a.m.

No. 133003

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

$1,159,420.00 U.S. CURRENCY; the residence located at 4260 LAKERIDGE COURT, WEST BLOOMFIELD, MICHIGAN; a 1988 LINCOLN, VIN #1LNBM9847JY854670; a 1988 TIFFANY, VIN #1MEBM60F3JH629001; a 1985 BAYLINER BOAT, HULL #2150CIERA SUNBR; a 1986 ROLLS ROYCE, VIN #SCZN42A3GCX14193; a 1988 JEEP, VIN #1J4FJ78L6KL426978; a 1988 JAGUAR, VIN #SAJKV1644JC522514; a 1988 DODGE, VIN #1B4FK5031JX205053; MISCELLANEOUS BANKING AND BROKERAGE ACCOUNTS; MISCELLANEOUS ITEMS NAMED IN A RETURN TO A SEARCH WARRANT; and a parcel of real property and the contents thereof located at 7335 N.W. 52ND COURT, LAUDERHILL, FLORIDA,

Defendants,

and

Appendix C

ROBERT HAWKINS, PAMELA HAWKINS, RASHAWN HAWKINS, RODERICKA HAWKINS, RYAN HAWKINS AND ROBERT HAWKINS, JR.,

Claimants-Appellants.

Before: Griffin, P.J., and Doctoroff and Brennan, JJ.

BRENNAN, J.

Claimants appeal as of right from an August 2, 1990, Judgment of Forfeiture of property seized under the Controlled Substances Act, MCL 333.7521; MSA 14.15(7521), by Wayne Circuit Judge Michael J. Talbot. We affirm in part and reverse in part.

The record reveals that in 1988, claimant Robert Hawkins pled guilty in Detroit Recorders Court to attempted possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(a)(v); MCL 750.92; MSA 28.287. The case was adjudicated under MCL 333.7411; MSA 14.15(7411) and he was placed on probation. The Wayne County prosecutor's office became suspicious that Hawkins, who was a retired factory worker at Chrysler, was living well beyond his legitimate income based upon the assets he disclosed in his probation report. The forfeiture unit of the Wayne County prosecutor's office supplied this information to the Oakland County Narcotics Enforcement Team ("NET") which began investigating Hawkins. This investigation ceased after an investigation by NET as well as the State Police revealed nothing unusual except for heavy traffic in and out of the claimants' house and the presence of many expensive automobiles.

Subsequently, the State Police referred an informant by the name of Ulmer to West Bloomfield Police Officer Jerome Sharpe.

Ulmer indicated that he saw a large amount of cocaine in the basement of claimants' house. Based on this information, NET and Sharpe led the execution of a search warrant of claimants' West Bloomfield home on May 9,1989. The search revealed, among other items, a great amount of cash, some of which had a residue of cocaine, weapons and a suspected drug ledger. A specially trained canine unit also indicated that traces of cocaine were present in areas throughout the house and one car belonging to the claimants. This search resulted in the instant forfeiture proceedings which were instituted on May 10, 1989.[1]

Prior to trial, the parties reached a comprehensive stipulation on the tracing of assets in this case. Robert Hawkins stated that he had worked for Chrysler Corporation for sixteen years. He further stated that he owned rental properties in Detroit since he was nineteen years old as well as a beer and wine store from 1978 to 1986. Hawkins explained his income from these sources plus some gambling profits and loans made. In addition, claimants alleged that they had a personal injury lawsuit in Macomb County Circuit Court from which they received $2,000,000. This lawsuit allegedly stemmed from a 1983 incident when Margaret Wilson, an insurance agent from Chicago, became upset after Pamela Hawkins told her she was not interested in the insurance Wilson was selling. Wilson allegedly hit Pamela who then fell over a banister and down some stairs. Claimants stated that Pamela was pregnant at the time and later had an abortion because she thought her doctor, Dr. Lall, told her that something may have been wrong with the fetus as a result of the fall. The Hawkins filed a lawsuit against Wilson in Macomb County Circuit Court on October 11, 1985, and were represented in that suit by attorney Alvin Brazell. Claimants later settled the suit with Wilson for two million dollars, a substantial amount of which was delivered in cash.[2] Brazzell abruptly left his practice in February 1987 and was serving time in

a federal prison at the time of trial for reasons unknown to this Court.

The trial judge found claimants' lawsuit against Wilson to be nothing more than a money laundering scheme. Judge Talbot ultimately forfeited the West Bloomfield home, the cash found therein, jewelry, weapons, cars, a computer and printer, a boat, property located in Florida and several different bank accounts, annuities and life insurance policies. Most of the property forfeited was located in Oakland County. Claimants raise a number of issues on appeal.

ISSUE I.

Claimants first argue that the court erred in forfeiting all of the assets except for the Lincoln, the Tiffany and the Bayliner boat because those are the only items covered by a seizure order or arrest warrant. Defendants contend that the trial court had no jurisdiction over non-seized assets and therefore, those assets should have been returned to claimants. However, pursuant to MCL 333.7522(a); MSA 14.15(7522), seizure without process may be made where it is incident to an arrest or a search warrant. Here, the previously issued search warrant included many of the items referred to by complainants. Therefore, those items did not need to be listed again on a seizure order. The property not included in the search warrant was subsequently seized with process by seizure orders and orders freezing assets. Consequently, the circuit court had jurisdiction to proceed with this case under § 7522.

Claimants assert that the trial court erred in forfeiting an annuity policy despite the fact that it was never named as a defendant in any filed complaint nor made the subject matter of a seizure warrant or order freezing assets. Contrary to claimants'

argument, a June 1, 1989, order freezing assets included two annuities. In addition, it is clear that claimants had notice prior to trial that the asset was subject to forfeiture based on the order freezing assets, settlement negotiations and its seizure by the search warrant execution. Notice regarding jurisdiction over the annuities should have been raised before trial. By leaving the matter to the time of trial, claimants waived jurisdiction over the policies to the court.

Claimants argue that the trial court lacked jurisdiction over property located in Florida. We agree. Michigan courts have jurisdiction only over land situated within its territorial borders. MCL 600.751; MSA 27A.751; *Stewart v Eaton*, 287 Mich 466; 283 NW 651 (1939). Any complaint to forfeit claimants' realty located in Florida should be filed with the Florida courts which have jurisdiction over such property.

ISSUE II.

Claimants argue that the trial court erred by denying their timely filed motion to change venue to Oakland County where all of the realty and personal property forfeited was located either in Oakland County or outside the state of Michigan However, assuming the trial court did err in denying the motion, reversal is not warranted since Michigan's venue provisions are nonjurisdictional. MCL 600.1601; MSA 27A.1601.

ISSUE III.

Claimants argue that the court erred in its rulings on several discovery matters. Claimants first argue that the trial court erred in denying claimants basic discovery. For example, claimants state that the trial court erred by not requiring plaintiff to answer an

interrogatory setting forth what the various theories of forfeitability were as to each item claimed forfeitable. However, plaintiff did respond indicating that forfeiture was sought on theories of proceeds, facilitator or container under MCL 333.7521; MSA 14.15(7521). The trial court properly found that plaintiff was not limited to rely on one theory and could properly argue alternative theories. MCR 2.111(A)(2). In addition, claimants state that the court erred by not requiring plaintiff to produce all documents concerning any criteria used by the plaintiff in bringing, prosecuting or settling cases under the forfeiture act. We agree with the trial court that this information was not relevant. Accordingly, we find no abuse of discretion. *Eyde v Eyde*, 172 Mich App 49, 54; 431 NW2d 459 (1988). Moreover, we fail to see how claimants were prejudiced. MCR 2.613(A).

Claimants next argue that the trial court erred in issuing for plaintiff "secret" subpoenas with no notice to plaintiff. Claimants refer to subpoenas which stated that "due to a continuing criminal investigation, notice of this Subpoena is not to be given to any named party." One subpoena was issued to Pamela Hawkins' doctor, Dr. Chitranjan Lall. Claimants argued that as a result of this unfair tactic, they were foreclosed from asserting the doctor/patient privilege. A similar subpoena was issued to First Federal of Michigan and a subpoena was issued to Shearson, Lehman, Hutton without notice to claimants. Claimants contend that they were prejudiced in preparing for this case since they never received notice of these subpoenas.

Claimants were entitled to service of any discovery requests on witnesses MCR 2.107(A); MCR 2.305(A)(l); MCR 2.306(B)(l). Such notice is necessary to any party before discovery may be had in order for the opposing party to assert any objection or move for a protective order to prohibit the production of any materials

otherwise not properly available in discovery. This conduct was reprehensible. Nevertheless, we do not find that the action was taken willfully to prejudice claimants but was taken for reasons involving the ongoing criminal investigation involving claimants. Further, Dr. Lall's testimony was kept out of evidence at trial after claimants asserted the doctor-patient privilege. Therefore, no prejudice resulted in that regard. MCR 2.613(A). Further, claimants do not suggest that plaintiff was not entitled to the information from First Federal of Michigan or Shearson Lehman Hutton nor do they claim that they were prejudiced by plaintiff's receipt of the information. These subpoenas were utilized to supplement financial documents which were in plaintiff's possession as a result of the confiscation of records from claimants' residence. Therefore, we find that reversal is not warranted on this basis.

Claimants contend that the court erred in refusing to require plaintiff's witnesses including, Randy Ulmer and various police officers to respond to inquiry during deposition and trial regarding their backgrounds and addresses. Claimants argue that Ulmer was the only witness who allegedly had first-hand knowledge of a claimed violation of the Public Health Code by Robert Hawkins and that his credibility was at issue. Therefore, claimants argue the information was relevant. We find that the trial court did not abuse its discretion by refusing to compel such discovery where the line of inquiry was not relevant. *Sucoe, supra.* We note that the cases claimants cite are distinguishable where claimants here had the names of the witnesses and could cross-examine them on other information in order to determine their credibility. We fail to see how claimants were prejudiced as a result. See also *People v Pleasant,* 69 Mich App 322; 244 NW2d 464 (1976).

Claimants argue that the trial court erred by not requiring plaintiff to identify and produce each and every document which it

intended to offer in evidence at trial as well as other evidence of narcotic trafficking that would sustain forfeiture of the Florida property. Plaintiff, however, indicated that a determination had not yet been made as to what documents it intended to offer but that all documents were available for claimants' inspection. Therefore, we find no abuse of discretion in that regard. *Eyde, supra.* Further, since we have decided that the Florida property was improperly forfeited, we need not address the second issue.

Claimants argue that the trial court abused its discretion by denying claimants' motion in limine to strike plaintiff's witness list. Claimants contend that such action was just where plaintiff failed to provide a witness list two months before the date set for completion of discovery as mandated for civil cases by third judicial circuit local rules. See LCR 2.301. Here, however, there was apparently no date set for completion of discovery nor was there any order entered compelling a witness list. Therefore, we find no abuse of discretion. *Dean v Tuckert,* 182 Mich App 27, 32; 451 NW2d 571(1990).

Moreover, we note that there are various factors the trial court must consider in determining discovery sanctions. See factors listed in *Dean, supra,* pp 32-33. Although plaintiff did not provide a witness list until one week before trial, plaintiff's tardiness does not appear to be wilful and claimants apparently never provided a witness list to plaintiff. Further, we find that claimants failed to establish prejudice where they speak in vague and general terms of unknown witnesses, but fail to specify who they are and how they were prejudiced other than in general and conclusory terms regarding the preparation of their defense. *Id.,* p 34. Many of the major witnesses, including Randy Ulmer, were deposed and apparently listed in plaintiff's answer to claimants' interrogatory number 15, asking plaintiff to identify each person plaintiff may

call as a witness at trial. Claimants had notice of the importance of the individuals and what information they had to offer. Accordingly, while we do not condone the behavior of the parties, we find no abuse of discretion.

ISSUE IV.

Claimants argue that the trial court erred in denying claimants an evidentiary (*Franks*)[3] hearing to determine the validity of the search warrant. Claimants contend the court erred in ruling that the validity of the search warrant had previously been decided in the federal court and that collateral estoppel prevented the trial court from redetermining the issue. Claimants argue that it is improper for this court to apply crossover estoppel to preclude the claimants challenging the validity of the search warrant. Claimants argue this is so where there is no mutuality between the plaintiffs in the two cases, where the federal court hearing the criminal case was required to apply a different burden of proof and where claimant Robert Hawkins was not given a full or fair opportunity to litigate the issue in the federal forum.

Collateral estoppel, as a means of judicial economy, precludes the relitigation of an issue in a subsequent and different cause of action between the same parties where the prior proceeding ended in a final judgment and the issue was: (1) actually litigated; and (2) necessarily determined. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). It is necessary to establish that the sarne parties were involved in both proceedings. *Id.*, p 155. Further, we must consider whether the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue. *Id.*, pp 156-157. Crossover estoppel involves issue preclusion in a civil proceeding from a criminal proceeding and vice versa. *Id.*, p 155.

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The prior proceeding was actually litigated since the federal trial resulted in a final judgment. Further, the same parties were involved. The federal prosecution and plaintiff in this case are essentially the same party, albeit of different governments. *Id.*, p 156. We also conclude that claimants had a full and fair opportunity to litigate the issue. Robert Hawkins was the only claimant who was involved in the prior proceeding. However, his interests should have been adequate to protect the interests of the other claimants. Finally, the issue was necessarily determined since the trial court in the federal action clearly ruled on the motion the merits. Accordingly, we find that the trial court properly applied collateral estoppel to this issue. Therefore, we need not address whether claimants' are entitled to a *Franks* hearing.

ISSUE V.

Claimants argue that the trial court erred in forfeiting assets despite the fact that the plaintiff failed to prove forfeitability by a preponderance of the evidence.

Michigan law provides that anything of value which can be traced to an exchange for a controlled substance is subject to forfeiture under MCL 333.7521(1)(f); MSA 14.14(7521)(1)(f). *In re Forfeiture of United States Currency,* 164 Mich App 171,178; 41 NW2d 700 (1987). Forfeiture proceedings are in rem civil proceedings and the party bringing the action must prove its case by a preponderance of the evidence. *In re Forfeiture of 719 N Main,* 175 Mich App 107,114; 437 NW2d 332 (1989). In order for an asset to be ordered forfeited, the trial court must find that there is a substantial connection between that asset and the underlying criminal activity. In contrast, property which has only an incidental or fortuitous connection to the unlawful activity is not subject to forfeiture. *In re Forfeiture of $5.264*, 432 Mich 242, 262; 439 NW2d 246 (1989).

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The trial court did not clearly err. MCR 2.613(C); *In re Forfeiture of $5,264, supra,* p 260. Contrary to claimants' argument, we do not believe that a specific incident of drug dealing must be shown for each asset; rather the assets need only be traceable to drug trafficking. In the case at bar, plaintiff relied on the theory that Robert Hawkins, a retired factory worker, was a drug trafficker and that based on his unexplained increase in net worth from approximately 1983 to 1989, most of the assets later acquired by claimants were associated with drug dealing. Plaintiff presented evidence that defendant was in fact a drug dealer. Further, plaintiff established that claimants had an exceedingly large income and amount of assets beyond what could be legitimately accounted for. Although claimants had apparently legitimate sources of income as well, they could not possibly account for their immense wealth. We find incredulous claimants' explanation for their extensive assets that they received a substantial cash payment for a personal injury claim. We agree with the trial court that the Macomb County lawsuit was fraudulent. Accordingly, there was sufficient evidence to demonstrate a substantial connection between drug trafficking and the property in this case.

ISSUE VI.

Claimants argue that the trial court erred by forfeiting property belonging to Pamela Hawkins through joint tenancy or tenancy by the entireties where Pamela Hawkins was an innocent owner whose property rights may not be diminished because of the conduct of another owner.

The controlled substances act provides that property owned by another is not subject to forfeiture where the owner lacks knowledge of the drug activity. MCL 333.7521(1)(d)(ii) and (f);

MSA 14.14(7521)(1)(d)(ii) and (f). See also *In re Forfeiture of $5.264, supra,* p 260. In the case of joint ownership of assets, the state may only forfeit the ownership interest of the noninnocent owner. *In re Forfeiture of $53*, 178 Mich App 480, 486; 444 NW2d 182 (1989).

The trial court found that any property Pamela Hawkins claimed as her individual property or property owned jointly with her husband was subject to forfeiture on a joint enterprise theory. Again, we find no clear error. MCR 2.613(C); *In re Forfeiture of $5,264, supra,* p 260. The evidence established that Pamela Hawkins enjoyed the substantial wealth her husband earned. It is logical to assume that Mrs. Hawkins was aware that the income was not derived from legitimate sources. Most importantly, since we found the lawsuit regarding Mrs. Hawkins' injuries was fraudulent, it follows that Mrs. Hawkins knowingly participated in this scheme to launder money.

ISSUE VII.

Claimants argue that the trial court erred in forfeiting assets traced by the plaintiff to origins more than two years prior to May 10, 1989, the initiation of the forfeiture action. Claimants refer to the two-year limitation period set forth in the Revised Judicature Act for actions for the recovery of a penalty or forfeiture based on a penal statute brought in the name of the people of this state. MCL 600.5809(2); MSA 27A.5809(2).[4] Claimants do not contend that the action was untimely. We note that the Michigan Legislature adopted forfeiture provisions modeled, in part, after the federal forfeiture statute. See n 1. Therefore, we find persuasive federal caselaw interpreting the similar provisions. *In re Forfeiture of $53*, 178 Mich App 480, 486; 444 NW2d 182 (1989). In *US v Milicia*, 760 F. Supp 877, 884 (ED PA 1991), the court found that the

forfeiture statute begins to run when the drug offense is complete. The court ultimately ruled that proceeds derived from or used to facilitate a drug offense after the effective date of the forfeiture statute were subject to forfeiture liability even though this date was beyond the statute of limitations. *Id.*, pp 884-885. Claimants do not contend that any property acquired prior to the effective date of the forfeiture statute was forfeited. Accordingly, we find that no error occurred in this regard.

ISSUE VIII.

Claimants argue that the trial court erred by employing mistakes of fact and mistakes of law in its decision. Claimants first contend that the trial court incorrectly concluded that it could rely on a net-worth theory while not having to find that the assets in this case were traceable to any specific drug transaction. We disagree. The drug forfeiture act requires that the property be traced to drug dealing by a substantial connection. *In re Forfeiture of $5.264, supra,* at 262. As discussed above, a specific incident need not be shown. Here, the incident Ulmer testified to together with the enormous income and assets beyond what claimants could legitimately have provides a substantial connection to narcotics activity.

Further, claimants argue that factual references regarding Robert Hawkins' involvement in drug dealing were also not supported by the record. However, the testimony of Randy Ulmer together with the "weight sheet" that was found in claimants' house was sufficient evidence to show that Robert Hawkins was a drug trafficker.

Claimants contend that the trial court made inconsistent findings regarding the credibility of informant Randy Ulmer.

Ulmer's testimony, when reviewed as a whole, was certainly questionable. However, we cannot say it was not credible, especially where the trial judge had a better opportunity to evaluate the witness. The trial court could properly find Ulmer credible although he had been impeached where he explained the inconsistencies. Further, the trial court could properly find that Ulmer had no bad personal feelings against claimants although he expected a percentage of the assets forfeited.

Finally, claimants assert that the trial court, in making its findings of fact, referred to matters not admitted into evidence such as newspaper articles. We disagree. While noting a specific article on attorney Alvin Brazzell's federal conviction, the trial judge also noted that he was basing his decision on the evidence Brazzell offered at trial only.

ISSUE IX.

Claimants argue that the trial court erred in not recusing itself despite its clear bias and partiality against claimants and/or claimants' counsel. We find that the trial court did not abuse its discretion in denying claimants' motion for recusal/ disqualification. *Law Offices of Lawrence J. Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). A judge is disqualified when the judge cannot impartially hear a case, including a proceeding in which the judge is personally biased or prejudiced for or against a party or attorney. MCR 2.003(B)(2). An actual showing of prejudice is required before a trial judge will be disqualified. *Mourad v Automobile Club Inc Ass'n*, 1B6 Mich App 715, 731; 465 NW2d 395 (1991). The party who challenges a judge's partiality based on bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *Arnholt v Arnholt,* 129 Mich App 810, 817; 343 NW2d 214 (1983).

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Claimants brought three motions for recusal based on bias and prejudice. However, since claimants failed to provide a transcript from the second motion and failed to bring the third motion before the chief judge of the trial court, we will not address them. *Nye v Gable, Nelson and Murphy,* 169 Mich App 411, 413; 425 NW2d 797 (1988); MCR 2.003(C)(3)(a); *Law Offices of Lawrence J. Stockler, PC, supra,* p 23. The first motion was based on various rulings made against claimants by the trial court and the trial judge's allegedly unusual and close relationship to the plaintiff and its staff. Defendant raises only the latter issue.

In regard to this issue, claimants refer to a note delivered by the investigator to the trial judge. However, the investigator was merely relaying a message from the court reporter to the judge stating that she had to catch a bus. Apparently, the investigator just happened to be sitting the closest to the judge. Claimants also refer to plaintiff's "admission" that they act as "runners and law clerks for the trial judge". However, defendants have seen fit to add the words "for the trial judge" which alters the meaning of plaintiff's statement.

Plaintiff explained numerous times that it had to act as runners and clerks for its own office due to a lack of staff. As a result, plaintiff stated that its position necessitated numerous trips to the courtroom and file drawers. Based upon this, we find no abuse of discretion.

ISSUE X.

Claimants argue that the trial court erred in ignoring its obligation to find a nexus or substantial connection between the subject assets and specific violations. We have already addressed this issue above.

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ISSUE XI.

Claimants argue that they were denied a fair trial as a result of the trial court's unreasonable treatment of claimants, their counsel and their witnesses during pretrial and trial. Claimants assert that the trial judge demonstrated his bias by his comments, rulings, questioning of the witnesses and conduct in general.

As one example of the trial judge's prejudice, claimants point to a letter sent by Judge Talbot to the federal government regarding an "opportunity to serve at the federal level in a position" helping to fight the war on drugs. Claimants point out that the judge kept a running "tally" of the amount of assets he had forfeited. However, we note that it was required to keep such a tally pursuant to MCL 333.7524a; MSA 14.15(7524). Moreover, the fact that the trial court has a personal ambition to fight the "war on drugs" does not mean that he would decide a case unfairly.

Further, a review of the trial court's questioning of witnesses leads us to believe that the trial judge was merely attempting to clarify testimony and elicit additional helpful information to aid in his role as factfinder. We note that a trial judge has more discretion to question witnesses during a bench trial than a jury trial and we do not find the questioning here to be improper. See *In re Forfeiture of $53, supra*, at 497; *Law Offices of Lawrence J. Stockler, PC, supra*, at p 24; *People v Meatte*, 98 Mich App 74, 78; 296 NW2d 190 (1980).

Since the instant case involved no jury, concern over the impact of the judge's comments and conduct did not exist. Nevertheless, a judge's comments and conduct can indicate a possible bias. A trial judge may comment about cases in the absence of a jury. *Ferrell v Vic Tanny*, 137 Mich App 238, 248; 357

NW2d 669 (1984). The issue of bias or prejudice should only come to this Court's attention when a litigant can show that the trial judge's views controlled his decision-making process. *Id.*

After carefully reviewing the entire record in this case, we conclude that reversal is not warranted on this basis. It appears that throughout the trial, the atmosphere was rather tense as a result of the bickering between counsel and between claimants' counsel and the trial judge. It appears to us that claimants' counsel provoked the trial court with their comments and conduct in general. In addition to being disrespectful to the court in many instances, claimant's counsel resorted to attacking plaintiffs counsel by apparently stating that her conduct "typified the basest kind of projection as described in psychiatric literature." This type of conduct was uncalled for. The judge also appeared to be agitated by the tactics of claimants' counsel such as what appeared in the trial judge's eyes to be attempts to create appellate parachutes and reliance on what clearly appears to be a fraudulent lawsuit as an explanation for some of claimants' extensive assets. As a result, the trial court was apparently becoming frustrated and was losing his patience. Although the trial judge may not have displayed the utmost courtesy, that is the ideal, not the requirement. What is required is that the parties receive a fair trial. Here, claimants have failed to show that the trial judge's views controlled his decisionmaking process. Accordingly, we find that a new trial is not warranted on this basis.

ISSUE XII.

Claimants argue that the trial court erred in denying their request for a jury trial. We disagree. The constitutional right to trial by jury under Const 1963, art 1, 14, applies to civil actions at law that were triable by a jury at the time the constitutional guarantee

was adopted. *Wolfenden v Burke,* 69 Mich App 394, 399; 245 NW2d 61 (1976), citing *Conservation Dep't v Brown,* 335 Mich 343; 55 NW2d 859 (1952). Since there was no such right in equitable matters, matters in equity are not available for jury trials unless so preserved or created by the legislature. *Wolfenden. supra,* at 399; *Thomas v Steuemol,* 185 Mich App 148,155-156; 460 NW2d 577 (1990). The forfeiture act does not indicate that a jury trial is available for forfeiture actions. Since a forfeiture action is equitable in nature, we find that the Legislature's failure to grant the right to a jury trial in forfeiture matters makes the right unavailable.

ISSUE XIII.

Claimants argue that the trial court erred by forfeiting accounts owned by Rashawn Hawkins, Rodericka Hawkins, Ryan Hawkins and/or Robert Hawkins, Jr., where there was no evidence linking the accounts to drug transactions. Claimants argue that the trial court erred when it asserted that the minor children's claims were purely "derivative" without any finding of consent or knowledge by the minor claimants. We find that the trial court did not clearly err in finding that the accounts should be forfeited. See MCR 2.613; *In re Forfeiture of $5,264, supra,* p 260. This case was based on a net worth theory. It was the contention of the prosecutors that claimants were living well beyond their legitimate income. Since there was no adequate explanation for the $25,000 in each child's account other than the drug proceeds, forfeiture was warranted. Claimants cannot circumvent forfeiture laws merely by depositing the drug proceeds in their children's accounts.

Claimants further argue that the trial court erred by forfeiting the children's accounts since they date back to more than two years before this action was commenced and therefore, violate the two-

year period of limitations. However, as discussed above, we find that no error occurred in this regard.

Affirmed in part and reversed in part.

/s/ Thomas J. Brennan
/s/ Richard Allen Griffin

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1. A federal criminal prosecution was also initiated against Robert Hawkins as a result of Ulmer's statements and the search of the claimants' house. According to claimants' brief, Robert Hawkins was ultimately convicted of possession with intent to distribute cocaine, possession of firearms in the course of a drug trafficking crime and being a felon in possession of firearms. He was sentenced to a federal prison where he currently resides.

2. The court records apparently reflected the settlement amount was $750,000.

3. *Franks v State of Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

4. The people argue that § 5809 is inapplicable and that the prompt filing requirement of MCL 333.7523; MSA 14.15(7523) applies and since the action was promptly filed, claimants' argument is without merit. Section 7523 provides that "[I]f property is seized pursuant to section 7522, forfeiture proceedings shall be instituted promptly." However, the prompt filing requirement refers to the time an action must be commenced *after* seizure. In support or our conclusion that the two-year period of limitations is applicable, we note that the Michigan Legislature adopted our forfeiture provisions modeled, in part, after the federal forfeiture statute. *In re Forfeiture of $5,264*, 432 Mich at 255-257. The federal forfeiture act provides for forfeiture actions to be filed promptly after seizure. 21 USC 881(b). Nevertheless, the federal courts apply the five-year general period of limitations for forfeiture actions. *US v 2401 S. Claremont, Independence. MO*, 724 F Supp 670, 673 (WD MO, 1989). Since the two statutes are in *pari materia* and can be construed harmoniously, they shall be. *Gooden v Transamerica Co*, 166 Mich App 793, 804; 420 NW2d 877 (1988).

Appendix C

STATE OF MICHIGAN
COURT OF APPEALS

No. 133003

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

$1,159,420.00 U.S. CURRENCY; the residence located at 4260 LAKERIDGE COURT, WEST BLOOMFIELD, MICHIGAN; a 1988 LINCOLN, VIN #1LNBM9847JY854670; a 1988 TIFFANY, VIN #1MEBM60F3JH629001; a 1985 BAYLINER BOAT, HULL #2150CIERA SUNBR; a 1986 ROLLS ROYCE, VIN #SCZN42A3GCX14193; a 1988 JEEP, VIN #1J4FJ78L6KL426978; a 1988 DODGE, VIN #1B4FK5031JX205053; MISCELLANEOUS BANKING AND BROKERAGE ACCOUNTS; MISCELLANEOUS ITEMS NAMED IN A RETURN TO A SEARCH WARRANT; and a Parcel of real property and the contents thereof located at 7335 N.W. 52ND COURT, LAUDERHILL, FLORIDA,

Defendants,

and

ROBERT HAWKINS, PAMELA HAWKINS, RASHAWN HAWKINS, RODERICKA HAWKINS, RYAN HAWKINS and ROBERT HAWKINS, JR.,

Claimants-Appellants.

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Before: Griffin, PJ., and Doctoroff and Brennan, JJ.

DOCTOROFF, J. (Dissenting)

I respectfully dissent from the majority's conclusion on Issue II. Although I agree that Michigan's venue provisions are not jurisdictional, I would reverse because the trial court erred in denying claimants' motion for change of venue. In *People ex rel Oakland Co Prosecutor v Suitcases & Miscellaneous Items,* Mich App __; __ NW2d __ (Docket No. 125292, rel'd 2/18/92), this Court held that, although both Macomb and Oakland Circuit Courts had jurisdiction over the property at issue, venue was proper in Macomb Circuit Court. The panel reasoned:

> According to MCL 600.1605; MSA 27A.1605, venue involving claims concerning the recovery of personal property properly lies in the county in which the subject of the action is situated. Property taken or detained pursuant to forfeiture proceedings is deemed to be in the custody of the seizing agency. MCL 333.7523(2); MSA 14.15(7523)(2). Therefore, because custody of the cash, gold, and jewelry is deemed to be with Chesterfield Township, venue over the proceedings concerning these items must lie in Macomb County. [Slip op, p 2.]

In the instant case, the seizing authority was an Oakland County police task force and the majority of the property seized is located in Oakland County. Accordingly, venue must lie in Oakland County. I would hold that the trial court clearly erred in denying claimant's motion to change venue to Oakland County,

vacate the judgment and remand to Oakland Circuit Court for a new trial. Furthermore, I urge the claimants to seek review of this issue of venue in the Michigan Supreme Court.

I also dissent from the majority's conclusion on Issue XI that the trial court's conduct did not deny claimants a fair trial.

During the course of the trial, the trial court engaged in extensive questioning of witnesses. The trial court's questioning of plaintiff's witnesses appears to have been intended to elicit testimony favorable to plaintiff's position, whereas the trial court's questioning of claimants' witnesses seems intended to intimidate the witnesses. The trial court made sarcastic comments regarding some of claimants' witnesses, further indicating its bias against claimants. In many instances, the trial court treated claimants or their attorneys with contempt. I disagree with the majority's conclusion that the letter sent by Judge Talbot to the federal government does not indicate that Judge Talbot would unfairly decide a case. The letter calls into question the judge's true reasons for denying claimants' motions to change venue and challenging jurisdiction over the Florida property. The trial court's actions support claimants' assertion that Judge Talbot was biased or predisposed against claimants and their attorneys and that the trial court was influenced by personal interest. I would hold that the trial court's conduct denied claimants a fair trial.

/s/ Martin M. Doctoroff

APPENDIX D — SUPPLEMENTAL ORDER OF FORFEITURE DATED AUGUST 10, 1990

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Civil Action

No. 89-909-769CZ 113
HON. MICHAEL J. TALBOT

PEOPLE OF THE STATE OF MICHIGAN EX REL JOHN D. O'HAIR, PROSECUTING ATTORNEY

Plaintiff,

vs.

$1,159,420.00 UNITED STATES CURRENCY; ET AL,

Defendants.

MARY SUE CZARNECKI (P-37194)
CHARLES H. MARR (P-36289)
Assistant Prosecuting Attorney
Attorney for Plaintiff

STUART L. STEIN
Pro Hac Vice
Attorney for Claimant ROBERT L. HAWKINS

JAMES W. BURDICK (P-11397)
Attorney for Remaining Claimants

SUPPLEMENTAL ORDER OF FORFEITURE

Appendix D

At a session of said Court held on AUG 10, 1990 in the Frank Murphy Hall of Justice, Detroit, Michigan

PRESENT: HON. MICHAEL J. TALBOT
Circuit Judge

THIS MATTER having come before the Court pursuant to a notice of Trial; the trial having been conducted and testimony presented; the Court having made findings of fact and conclusions of law; and for the reasons stated on the record; and a Judgment of Forfeiture having been previously entered by this Court on August 3, 1990, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the Michigan State Police (Oakland County Narcotics Enforcement Team) shall sell and/or liquidate the following property which has previously been ordered forfeit by this Court:

One 1989 Jeep, Vin 1J4FJ78L6KL426978; One 1988 Dodge, VIN JB7FJ43E6JJ002031; One 1988 Jaguar, VIN SAJKV1644JC522514; One 1986 Rolls Royce, VIN SCAZN42A3GCX14193; One 1988 Tiffany, VIN 1MEBM60F3JH629001 (if located); and one 1985 Bayliner Boat, hull number BLIA02SJF485 with trailer, VIN ESCORT 21SJ.

Two Central Life Single Premium Deferred Annuity(s): Certificate number 1763964 in the name of Pamela Hawkins with a face value of $50,000.00 plus interest, and Certificate number 1763965 in the name of Robert Hawkins with a face value of $50,000.00 plus interest.

Two Life Insurance Single Premium Policies, both Hutton

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Life Futureplan(s): policy number 0403284-00M in the name of Robert Hawkins with a face value of $100,000.00 plus interest, and Policy number 0403285-00M in the name of Pamela Hawkins with a face value of $100,000.00 plus interest.

The following accounts which are currently located at Shearson Lehman, with approximate balances as listed: 210-81007-16-098 in the name of Ryan Hawkins, formerly account number D06-70745 and subsequently changed to number 52545, with an approximate value of $25,000.00 plus interest; account 210-22035-16-098 in the name of Robert Hawkins, Jr., formerly D06-70744 with an approximate balance of $27,233.71 plus interest; account number 210-22033-18-098 in the name of Rodericka Hawkins, formerly D06-70742 with an approximate balance of $25,000.00 plus interest; and account number 210-22034-17-098 in the name of Rashawn Hawkins, formerly D06-70743 with an approximate balance of $25,000.00 plus interest; account number 210-18524-121-098, formerly D06-66418 in the name of Pamela Hawkins with an approximate balance of $115,158.25 plus interest; account number 210-16951-18-098, formerly D06-63975, a Joint Financial Management Account with an approximate balance of $57,315.89 plus interest; account number 681-159116-3, a joint checking account with an unknown balance, plus interest; account number 210-36435-12-098, a Joint Express Credit (now merged into Financial Management Account 210-16951-18); and account 210-16951-26-098, a Jointly held Municipal Income Trust, with an unknown balance, plus interest.

The following accounts located at Michigan National Bank: a checking account in the name of Pamela Hawkins, account number 6823-32904-7, account balance unknown, plus interest; CD number 90-9477764-7 for $100,000.00 plus interest in the name of Robert Hawkins; CD number 90-9477765-4 in the amount of $20,000.00 plus interest in the name of Pamela Hawkins.

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The following accounts at First Federal of Michigan: CD number 47384 in the amount of $400,000.00 plus interest in the name of Robert Hawkins; and account number 26-014316-9, formerly account number 26-002903-8 with an approximate balance of $700.00 plus interest.

The Miscellaneous items named in a search warrant return and specifically mentioned in a joint stipulation of the parties, being more specifically described as miscellaneous mens jewelry, womens jewelry, one jewelry box, one Apple computer with printer, monitor, and disks, all firearms, and one file cabinet.

IT IS FURTHER ORDERED that the real property described as Lot 5, Lakeridge of Wabeek, as recorded in Liber 162, Page 7 of Plats Oakland County records, commonly known as 4260 Lakeridge Court West Bloomfield, Michigan shall be titled in the name of the County of Wayne and sold by the County of Wayne.

IT IS FURTHER ORDERED that the distribution of the assets after sale shall be in accordance with the August 3, 1990 Order of this Court.

IT IS HEREBY FURTHER ORDERED that the terms and conditions of the original Judgment of forfeiture dated August 3, 1990 shall remain in full force and effect.

s/ HON. MICHAEL J. TALBOT
HON. MICHAEL J. TALBOT
Circuit Court Judge

Approved as to form:
s/ Mary Sue Czarnecki P37194
Assistant Prosecuting Attorney

Appendix D

s/ Charles Marr
Charles Marr P36289
Assistant Prosecuting Attorney

[stamped]
A TRUE COPY
JAMES R. KILLEEN
WAYNE COUNTY CLERK
by s/ Madeline Jennings
DEPUTY CLERK

APPENDIX E — JUDGMENT OF FORFEITURE DATED AUGUST 3, 1990

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Civil Action

No. 89-909-769 CZ 113
HON. MICHAEL J. TALBOT

PEOPLE OF THE STATE OF MICHIGAN EX REL JOHN D. O'HAIR, PROSECUTING ATTORNEY

Plaintiff,

vs.

$1,159,420.00 UNITED STATES CURRENCY; ET AL,

Defendants.

MARY SUE CZARNECKI (P-37194)
CHARLES H. MARR (P-36289)
Assistant Prosecuting Attorney
Attorney for Plaintiff

STUART L. STEIN
Pro Hac Vice
Attorney for Claimant ROBERT L. HAWKINS

JAMES W. BURDICK (P-11397)
Attorney for Remaining Claimants

JUDGMENT OF FORFEITURE

Appendix E

At a session of said Court held on in the Frank Murphy Hall of Justice, Detroit, Michigan

PRESENT: HON. MICHAEL J. TALBOT
Circuit Judge

THIS MATTER having come before the court pursuant to a notice of Trial; the trial having been conducted and testimony presented; the Court having made findings of fact and conclusions of law; and for the reasons stated on the record; and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the below described defendant property is forfeit to the County of Wayne as the budgetary authority for the Wayne County Prosecuting Attorney, and to the State of Michigan as the budgetary authority for the Michigan State Police (Oakland County Narcotic Enforcement Team) subject to the terms and conditions set forth below.

The real property described as Lot 5, Lakeridge of Wabeek, as recorded in Liber 162, Page 7 of Plats Oakland County records, commonly known as 4260 Lakeridge Court West Bloomfield, Michigan.

The real property described as Lot 34, Block 3, Boulevard Woods east, according to the Plat thereof, Recorded in Plat Book 108 at Page 19 of the Public Records of Broward County, Florida commonly known as 7335 NW 52nd, Lauderhill, Florida, and the contents thereof.

One 1989 Jeep, VIN 1J4FJ78L6KL426978; One 1988 Dodge, VIN JB7FJ43E6JJ002031; One 1988 Jaguar, VIN SAJKV1644JC522514; One 1986 Rolls Royce, VIN

SCAZN42A3GCX14193; One 1988 Tiffany, VIN 1MEBM60F3JH629001; and one 1985 Bayliner Boat, hull number BLIA02SJF485 with trailer, VIN ESCORT 21SJ.

IT IS FURTHER ORDERED that the following Annuity and Insurance policies are forfeit consistent with the terms and conditions set forth in this Order:

Two Central Life single Premium Deferred Annuity(s): Certificate number 1763964 in the name of Pamela Hawkins with a face value of $50,000.00 plus interest, and Certificate number 1763965 in the name of Robert Hawkins with a face value of $50,000.00 plus interest.

Two Life Insurance Single Premium Policies, both Hutton Life Futureplan(s): policy number 0403284-00M in the name of Robert Hawkins with a face value of $100,000.00 plus interest, and Policy number 0403285-00M in the name of Pamela Hawkins with a face value of $100,000.00 plus interest.

The defendant United States currency cited in the case heading in the amount of $1,159,420.00 is forfeit.

The following accounts which are currently located at Shearson Lehman, with approximate balances as listed: 210-81007-16-098 in the name of Ryan Hawkins, formerly account number D06-70745 and subsequently changed to number 52545, with an approximate value of $25,000.00 plus interest; account 210-22035-16-098 in the name of Robert Hawkins, Jr., formerly D06-700744 with an approximate balance of $27,233.71 plus interest; account number 210-22033-18-098 in the name of Rodericka Hawkins, formerly D06-70742 with an approximate balance of $25,000.00 plus interest; and account number 210-

22034-17-098 in the name of Rashawn Hawkins, formerly D06-70743 with an approximate balance of $25,000.00 plus interest; account number 210-18524-121-098, formerly D06-66418 in the name of Pamela Hawkins with an approximate balance of $115,158.25 plus interest; account number 210-16951-18-098, formerly D06-63975, a Joint Financial Management Account with an approximate balance of $57,315.89 plus interest; account number 681-159116-3, a joint checking account with an unknown balance, plus interest; account number 210-36435-12-098, a Joint Express Credit (now merged into Financial Management Account 210-16951-18); and account 210-16951-26-098, a Jointly held Municipal Income Trust, with an unknown balance, plus interest.

IT IS FURTHER ORDERED that the following accounts located at Shearson Lehman be returned to Claimants; 210-62532-10-098, formerly D06-63977, an Individual Retirement Account in the name of Robert Hawkins, with an approximate balance of $554.51, plus interest; account 210-62531-11-098, formerly F06-63976, an Individual Retirement Account in the name of Pamela Hawkins with an approximate balance of $2,454.13; and a checking account in the name of Pamela Hawkins, number 680-033014-7, current balance unknown.

IT IS FURTHER ORDERED that the following accounts located at Michigan National Bank are forfeit subject to the terms and conditions set forth herein; a checking account in the name of Pamela Hawkins, account number 6823-32904-7, account balance unknown, plus interest; CD number 90-9477764-7 for $100,000.00 plus interest in the name of Robert Hawkins; CD number 90-9477765-4 in the amount of $20,000.00 plus interest in the name of Pamela Hawkins.

IT IS FURTHER ORDERED that the following accounts at First Federal of Michigan are forfeit subject to the terms and

conditions set forth herein; CD number 47384 in the amount of $400,000.00 plus interest in the name of Robert Hawkins; and account number 26-014316-9, formerly account number 26-002903-8 with an approximate balance of $700.00 plus interest.

IT IS FURTHER ORDERED that Miscellaneous items named in a search warrant return and specifically mentioned in a joint stipulation of the parties, being more specifically described as miscellaneous mens jewelry, womens jewelry, one jewelry box, one Apple computer with printer, monitor, and disks, all firearms, and one file cabinet containing miscellaneous records are forfeit consistent with the terms and conditions set forth herein.

IT IS FURTHER ORDERED that pursuant to MCLA 333.7524, all forfeited money, and all money derived from the sale of any forfeited item, shall, upon the entry of a dispositional Order of this Court, be used exclusively to enhance drug law enforcement efforts under MCLA 333.7101 through 333.7545 and shall therefore be deposited by the seizing agency into a Special Revenue Fund governed by restrictions similar to those prescribed for Drug Law Enforcement Fund 265 of Michigan's Uniform Chart of Accounts.

IT IS FURTHER ORDERED that any and all expenditures of drug-related forfeiture proceeds distributed by court action to a controlled substance law enforcement task force which is not established by interlocal agreement pursuant to MCLA 124.501 et. seq. shall be made pursuant to appropriation by the local units of government having representatives on the task force.

IT IS FURTHER ORDERED that costs will be reviewed by the Court and addressed in a subsequent Order.

Appendix E

IT IS FURTHER ORDERED that the Office of the Wayne County Prosecuting Attorney and the Oakland County Narcotic Enforcement Team shall share equally in the proceeds of this controlled substances forfeiture.

Honorable Michael J. Talbot
Judge of the Circuit Court

Approved as to form:

s/ Charles H. Marr
Charles H. Marr (P-36289)
Assistant Prosecuting Attorney
Attorney for Plaintiff
1441 St. Antoine, Room 1156
Detroit, Michigan 48226
(313) 224-5831

s/ Mary Sue Czarnecki
Mary Sue Czarneck (P-37194)
Assistant Prosecuting Attorney
Attorney for Plaintiff
1441 St. Antoine Room 1156
Detroit, Michigan 48226
(313) 224-5831

APPENDIX F — LETTER FROM JUDGE TALBOT TO THE WHITE HOUSE DATED JUNE 28, 1990

The Circuit Court
for the Third Judicial Circuit of Michigan
and
The Recorder's Court
for the City of Detroit
1441 St. Antoine
Detroit, Michigan 48225

June 28, 1990

Chase Untermeyer
Assistant to the President
Office of Presidential Personnel
White House
Washington, D.C. 20500

Dear Mr. Untermeyer:

By way of introduction, may I explain that a series of experiences the past few days have prompted my writing to you.

The first occurred when I was solicited for an interview by the National Center for State Courts regarding generally drugs, sentencing and asset forfeiture. The second experience was in reading of Judge Bonner's nomination as Administrator of the D.E.A. I applaud Judge Bonner's selection as one more indication of the President's strong commitment to the war on drugs. I also salute Judge Bonner for his sacrifice and willingness to serve in this very challenging office. Here I was holding forth in this interview on my opinions about the most serious problem in our country today and here is another judge who has the courage to leave a desirable and safe judicial office to put his beliefs to work.

Appendix F

To put it simply, I decided that since I have wanted to more actively contribute to defeating the scourge of drugs then I should act. Thus my letter to you sir.

I have served as a trial judge in Detroit for over 12 years. I preside exclusively over criminal felony cases in one of the largest counties (Wayne) in this country. For over three years I also had exclusive responsibility for all drug asset forfeiture cases in the county. This resulted in the disposition of some 1600-1700 cases and the seizure of approximately $18 million in cash and assets. My sentencing philosophy and my responsibility in presiding over some of the most visible criminal trials in the state have generated a public profile where arguably I have been able to have a minimal impact in deterring crime and given some hope to victims of crime.

I have also had the opportunity to assist in the writing of passage of the Michigan Victim's Rights Act as well as passage of the law giving the prosecutor the right to a jury trial in our state. I currently serve on the Board of N.O.V.A. (National Organization of Victim's Assistance).

I recite the above simply to put in context my interest in the drug problem and particularly in the efforts to combat this terrible evil. I hope I have contributed to my community during my tenure. If it is to be that I continue as a judge in Detroit I will attempt to do my best with each case that comes before me.

Mr. Untermeyer, I do not seek a federal judicial appointment. Nor do I seek a "a job". What I am seeking, frankly, is opportunity to serve at the federal level in a position where training, experience and administrative skills might be directed at effecting the outcome of our drug war.

Appendix F

I have to admit to some trepidation in sending in a "blind" letter such as this. You therefore have my sincere gratitude for your courtesy and consideration.

Yours very truly,
s/ Michael J. Talbot
Michael J. Talbot
Judge of the Recorder's Court
for the City of Detroit

MJT/dh
Enclosures

APPENDIX G — AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT DATED MAY 9, 1990

AFFIDAVIT FOR SEARCH WARRANT

STATE OF MICHIGAN)
COUNTY OF OAKLAND) SS
)

Officer JEROME R. SHARPE, affiant, being first duly sworn, on oath deposes and says:

(1) That the following property constitutes evidence of criminal conduct: Cocaine, any raw material, equipment, weapons or paraphernalia used in the weighing, cutting, packaging, storage, processing, protection or manufacturing of Cocaine; proofs of residency, such as, but not limited to, utility bills, correspondence, and keys to the premises; proofs as to the identities of unknown suspects, such as, but not limited to, photographs, certificates, and records of purchases and sales of controlled substances; and illegal drug proceeds and records pertaining to drug trafficking.

(2) Affiant further says that the above-mentioned property is located at the following decribed place: All rooms, compartments, hallways, storage areas, porches, and any attic or basement accessible therefrom of a house located at 4260 Lakeridge Court, Township of West Bloomfield, County of Oakland, State of Michigan; said building is a single family dwelling, two story, brown brick and wood sided structure, with an attached multi-car garage. The numbers "4260" are conspicuously affixed to the front (South) side over the door. The search shall include a basement room with a brown steel door as well as any safes located on the premises.

Appendix G

(3) Affiant further says that he has probable cause to believe the above-listed property to be searched for and seized is now located upon said described premises, based upon the following facts:

A. That the Affiant has been a sworn Police Officer for approximately eight years and is employed by the West Bloomfield Township Police Department.

B. That the Affiant is currently assigned to the Oakland County Narcotics Enforcement Team as an investigator and has had specialized training in the recognition of controlled substances, paraphernalia associated with controlled substances, and activities associated with trafficking in controlled substances, from the Oakland Police Academy and the Michigan State Police Academy.

C. That on 05-09-89 in the early evening hours affiant spoke with a confidential informant (hereinafter the C.I.) who indicates:

1. That within the last two and one-half days the C.I. had occasion to be inside the premises at 4260 Lakeridge Court, West Bloomfield, Michigan.

2. That the C.I. was let into the house by a Black Male known to him as "Rob" and was taken to the basement.

3. That in the basement was a ten by fourteen foot utility room protected by a steel door which they entered.

Appendix G

4. That inside the room was a large pile of pre-packaged bricks of cocaine which the C.I. based upon his prior drug dealings, estimated to be between two and three hundred kilos.

5. That the C.I. was present and observed when a large sum of money was given to "Rob" in exchange for several kilos of cocaine.

6. That the C.I. has been at the same location on at least three prior occasions and each time at least two kilos of cocaine were purchased from inside the house.

7. That in addition to "Rob" the house is occupied by "Rob's" wife "Pam".

D. That affiant believes information furnished to be reliable and the C.I. to be credible based upon the following:

1. That affiant has personally checked the computer records at the Secretary of State which indicate that the premises at 4260 Lakeridge Court are occupied by Robert and Pamela Hawkins.

2. That following their conversation on 05-09-89 affiant and the C.I. drove past the premises at 4260 Lakeridge Court and they were exactly as had been described by the C.I.

3. That on the evening of 05-09-89 affiant personally spoke with David Bergsma at the Michigan State Police Brighton Post who indicated:

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a. That he is a Detective/Sergeant with the Michigan State Police and has been employed in law enforcement for twenty-one years.

b. That he personally knows and has dealt with the C.I. for a period of eight years.

c. That the C.I. has provided information that assisted in securing several Federal indictments.

d. That he has received numerous tips from the C.I. and has never received any false or misleading information.

4. That the statements made by the C.I. are against the C.I.'s penal interest and no promises or inducements were given to the C.I. in order to obtain the information.

E. That affiant has spoken to Lt. Paul Meneguzzo of the Michigan State Police Criminal Surveillance Unit who indicates:

1. That Robert Hawkins was the subject of a week long surveillance operation in January 1989.

2. That during that time Hawkins was observed to make numerous short stops at various locations throughout Wayne and Oakland County, wherein he entered said locations and stayed for only a few minutes before leaving and going to the next location.

Appendix G

3. That during the course of their surveillance several different vehicles were repeatly seen in the driveway of 4260 Lakeridge Court, several of which were rental vehicles.

F. That based upon affiants experience and training, the above observations are consistent with a person involved in narcotics trafficking.

G. That on 05-09-89 affiant spoke with Special Investigator Frank Heaney who indicated:

1. That he has been employed in law enforcement for over twenty-six years and is presently employed by the Wayne County Prosecutors Office Forfeiture Unit.

2. That since the Fall of 1988 he has been investigating the financial condition of Robert Hawkins of 4260 Lakeridge Court.

3. That his investigation has revealed:

a. That Robert Hawkins is a factory worker presently laid off from Chrysler.

b. That Robert Hawkins paid cash for the construction of his home which cost approximately $275,000.

c. That Robert Hawkins possesses certificates of deposit valued at more than $400,000.

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d. That Robert and Pamela Hawkins own numerous expensive automobiles.

e. That he was unable to identify any legitimate source of income for Robert Hawkins whether from inheritence, lawsuit or lottery.

H. That based upon his training and experience affiant believes that the financial circumstances as described by Frank Heaney are consistent with a those of a person who is trafficking in large quantities of controlled substances.

I. That based upon his training and experience affiant believes that people engaged in large scale narcotics trafficking will record and memorialize the transactions as well as maintain financial records of their activities.

J. That based upon the above information, affiant believes the premises at 4260 Lakeridge Court are habitually and presently being used for the storage and sale of cocaine and therefor request authority to search for and seize and cocaine, proceeds, records or other evidence of drug trafficking.

s/ illegible
Affiant

Subscribed and sworn to before me this 9th day of May, 1989.

s/ illegible
Judge in and for the 48th District Court, Oakland County, State of Michigan.

(2)

Supreme Court, U.S.
FILED
SEP - 8 1993
OFFICE OF THE CLERK

No. 93-160

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ROBERT HAWKINS, PAMELA HAWKINS, RASHAWN HAWKINS, RODERICKA HAWKINS, RYAN HAWKINS, and ROBERT HAWKINS, JR.,
Petitioners,

vs.

PEOPLE OF THE STATE OF MICHIGAN, ex rel JOHN D. O'HAIR, Prosecuting Attorney
Respondent

On Petition For Writ of Certiorari

RESPONDENT'S ANSWER IN OPPOSITION

JOHN D. O'HAIR
Prosecuting Attorney

*TIMOTHY A. BAUGHMAN
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(313) 224-5792

MARYSUE CZARNECKI
Assistant Prosecuting Attorney

*Counsel of Record

35 pp

STATEMENT OF QUESTIONS PRESENTED

I.

IS A REMAND REQUIRED WHERE: PETITIONER FAILED TO RAISE ANY EIGHTH AMENDMENT ISSUE IN STATE COURTS; THE INSTANT CASE PRESENTS A DIFFERENT THEORY OF RECOVERY THAN THAT PRESENTED IN AUSTIN; AND THE EIGHTH AMENDMENT HAS NOT BEEN HELD TO APPLY TO THE STATES THROUGH THE FOURTEENTH AMENDMENT?

II.

WERE PETITIONERS DENIED A FAIR TRIAL ON THE BASIS OF AN ALLEGED LACK OF JUDICIAL IMPARTIALITY?

III.

IS IT IMPROPER FOR A TRIAL COURT TO DECLINE TO REVISIT A FRANKS V DELAWARE ISSUE IN A STATE FORFEITURE TRIAL WHEN THE PRECISE ISSUE WAS RAISED AND DECIDED UPON WITHIN THE CONTEXT OF A FEDERAL CRIMINAL TRIAL OF ROBERT HAWKINS?

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STATEMENT OF FACTS OF THE CASE

On May 9, 1989, a search warrant was executed at the residence of ROBERT and PAMELA HAWKINS. 5/1/90A 26-29. The warrant was based in part upon information obtained from a confidential informant named RANDY ULMER. The police recovered from the residence over one million dollars in U.S. currency. Recovered from an end table which contained a hidden compartment was approximately one-half million dollars in U.S. currency. Id. 33-35, 40. The currency was bundled in approximate $15,000 amounts. Id. 41-44. This amount was consistent with the wholesale price of a kilo of cocaine. 5/2/90 165-166. Drug ledgers were found in the master bedroom which reflected a sale of approximately sixty-nine kilos of cocaine. A travel itinerary was also found which indicated that the HAWKINS were flying to New York on May 10, 1989 in the morning and were due to return to the Detroit area later

that same day. 5/2/90 91-94; 187-195; 5/7/90 51-56. Three pieces of luggage full of the remaining approximately one-half million dollars in cash were recovered in the master bedroom. Id. at 186-187. White residue on one of the $20 bills was visible to the naked eye of the police officers. Id. 146-148; 162-164. The substance field tested positive for cocaine. All of the currency recovered from the house was fanned over a clean table and the residue was collected for chemical analysis which was found to contain cocaine. 5/1/90A 41-44; 5/3/90 18-31, 85-126.

Located in the house were numerous safes including a pedestal column with a safe hidden in the bottom of the column. 5/2/90 175-179. PAMELA HAWKINS also rented a safe deposit box at a location called the Depository; the rented safe's dimensions

were approximately four feet in length and two or three feet in depth. 5/3/90 34-38.

The jewelry recovered from the master bedroom of the house had an estimated worth of over $100,000. 5/2/90 195-202; 5/7/90 35-39. The remaining defendant items were also taken which included a Tiffany, Bayliner Boat, Rolls Royce, Jeep, Jaguar, Dodge and Lincoln as well as thousands of dollars in various bank accounts.

ROBERT HAWKINS worked at Chrysler Corporation in the capacity of a factory worker. PAMELA HAWKINS worked on and off on a part time basis.

ROBERT HAWKINS was prosecuted in the federal system with narcotic violations. The confidential informant, RANDY ULMER, testified on behalf of the federal government at the criminal trial. ROBERT

HAWKINS was convicted and sentenced to approximately thirty years imprisonment. His conviction has been affirmed in the federal system. A civil narcotic forfeiture action was filed at the state level pursuant to MCLA 333.7521, et seq. ROBERT HAWKINS and PAMELA HAWKINS testified. Also testifying on behalf of the government was the confidential informant, RANDY ULMER.

The forfeiture trial began on May 1, 1990. Testimony was taken on May 2, May 3. The trial was adjourned from that Thursday to the following Monday, May 7, 1990. Testimony was taken on May 8, 9 and 10. The trial was then continued until May 15, 1990. The trial was then adjourned until July 16, 1990.

Testimony was presented concerning the net worth of the HAWKINS. 7/16/90

11-68. The HAWKINS' assets for the listed years were the following:

$ 179,987 for 1983
$ 207,353 for 1984
$ 799,182 for 1985
$1,475,542 for 1986
$2,140,517 for 1987
$2,277,620 for 1988
$3,450,582 for four months in 1989. Id. 19-41.

Testimony also established the lavish spending habits of the HAWKINS. PAMELA HAWKINS had a common practice of purchasing large money orders under the $10,000 federal reporting requirement and depositing them into various banks on a regular basis. Many luxury items were purchased including trips, numerous automobiles, jewelry, real estate, extravagant parties. 5/9/90 140-160. When the network was put together by the accountants, they decided that they would not include as a factor any normal "cost of

living" 7/16/90 22-43. There was insufficient legitimate income to support the majority of the assets. Id. Between December 31, 1983 and May 9, 1989, income from unknown and unexplainable sources was $2,708,156.00. 7/16/90 22-43.

The Government called as witnesses ROBERT HAWKINS and PAMELA HAWKINS. The confidential informant, RANDY ULMER, also testified.

The defense proffered at the forfeiture trial was that the money and all of the assets were the result of income generated from a lawsuit settlement. PAMELA HAWKINS claimed that a woman named MARGARET WILSON came to Mrs. HAWKINS' residence for purposes of selling an insurance policy. MARGARET WILSON became irate and assaulted PAMELA HAWKINS who happened to be in the very early stages of a pregnancy. PAMELA

HAWKINS testified that her doctor told her the fetus she was carrying was killed and an abortion was necessary. 5/9/90 172-173. PAMELA HAWKINS was impeached because of her conflicting testimony surrounding the reasons for the abortion. After impeachment, PAMELA HAWKINS indicated that the doctor never recommended the abortion. Prior to her impeachment, PAMELA HAWKINS was insistent that the doctor informed her the fetus was dead and that an abortion was necessary. 5/9/90 172-173; 7/17/90 20-30. The doctor was produced at the trial but PAMELA HAWKINS asserted the doctor/patient privilege. Even though PAMELA HAWKINS testified concerning her medical examination and the "seeming" medical conclusion of her doctor, the trial court did not compel the doctor to testify at trial. 7/17/90 20-30. MARGARET WILSON did not testify at the trial nor did the HAWKINS know where she lived.

The parties stipulated to the source of the funds utilized to purchase most of the defendant properties as well as to the time of the purchases and to the tracing of the funds deposited into the various bank accounts. The source of the funds and the funds utilized to purchase the assets came from the MARGARET WILSON lawsuit. The entire court file of the lawsuit was admitted into evidence at the forfeiture trial. 7/17/90 5-19. The lawsuit was filed by attorney BRAZELL who subsequently was the subject of federal indictments for money laundering. 5/9/90 19-93, 160-178; 5/10/90 20-58, 60-158; 5/15/90 11-69. BRAZELL testified that at the HAWKINS' request, BRAZELL did not participate in any settlement negotiations. Rather, negotiations were the result of two phone calls between ROBERT HAWKINS and MARGARET WILSON. 5/9/90 43. MARGARET

WILSON was never represented by any attorney. Id. After two telephone calls, MARGARET WILSON agreed to pay the sum of two million dollars in settlement of the lawsuit. Id. The two million dollar amount was decided by ROBERT HAWKINS who just came up with that amount. 5/9/90, 18, 19-93, 160-178; 5/10/90 20-58, 60-158; 5/15/90 11-69.

The two million dollars was paid in cash and two of the cash payments were made at BRAZELL'S office. The first payment of $500,000 was received less than one month before the second payment of an additional $640,000. It was unclear when the third $750,000 payment was received, but that payment was also in cash. The quantity of cash was so enormous that it was necessary to make the payments in large suitcases. 5/10/90 68-69, 89, 100. The money was then deposited into BRAZELL'S client trust fund

and checks were subsequently written to the HAWKINS.

BRAZELL represented WILSON in the formation of numerous dummy corporations. Each was set up with BRAZELL acting as an officer of the corporation and as an authorized check signer. 5/10/90 98-130. Both BRAZELL and WILSON were the only authorized check signatories. 5/10/90 98-130. Each of the dummy corporations utilized a residential address which had no relationship to the corporation. 7/16/90 3-9. BRAZELL opened numerous bank accounts for WILSON in the names of WILSON APPLIANCE & HARDWARE, WILSON LIQUOR & FOOD and DEXTER WILSON GROCERY. These accounts were opened within two days of each other and each of the named accounts were opened at four different financial institutions. 5/10/90 131-147; 5/15/90 11-29.

Each of these corporate bank accounts reflected checks written to either ROBERT HAWKINS or ROBERT AND PAMELA HAWKINS. No other checks were written on any of the corporate accounts. Neither HAWKINS nor Brazell could offer a plausible explanation as to the additional check payments which amounted to some $224,000.00, although ROBERT HAWKINS confirmed his endorsement on the back of the check.

In addition, Brazell opened an account in the name of Dallas Land and Cattle on which he was the only signatory (5/10/90 130). One check was written from that account payable to Robert and Pamela Hawkins in the amount of $750,000.00. The check was endorsed by the HAWKINS but not cashed due to insufficient funds (5/9/90 86). Some of the various banks closed the numerous WILSON accounts. In each case, the entire remaining balances were deposited

into bank accounts held by the HAWKINS. All of these payments were in addition to the alleged lawsuit settlement.

The alleged WILSON lawsuit filed by BRAZELL on behalf of the HAWKINS was admitted into evidence. 7/17/90 5-19. The case was put on the no progress docket and dismissed. 7/17/90 5-19. A consent judgment was thereafter signed by the parties but not by the judge. Id. That document reflected a settlement amount of $750,000.00. Id. The HAWKINS testified, however, that they received over two million dollars which was given to them primarily in the form of cash which was allegedly brought to Brazell's office by MARGARET WILSON. 5/9/90 18, 160-178; 5/10/90 20-58, 60-158; 5/15/90 11-69.

The money was kept either in the HAWKINS' house, until they went out of town

at which time the money was put into the trunk of one of their cars, and/or in various financial institutions. 5/9/90 18-93, 160-178; 5/10/90 20-58, 60-158; 5/15/90 11-69.

The trial court ordered the defendant items forfeit and additionally found that the lawsuit was fraudulent and BRAZELL's testimony to be beyond comprehension. 7/23/90 21; 8/24/90 20.

REASONS FOR DENYING WRIT

I. **REMAND IS NOT REQUIRED BECAUSE: PETITIONER FAILED TO RAISE ANY EIGHTH AMENDMENT ISSUE IN STATE COURTS; THE INSTANT CASE PRESENTS A DIFFERENT THEORY OF RECOVERY THAN THAT PRESENTED IN AUSTIN; AND THE EIGHTH AMENDMENT HAS NOT BEEN HELD TO APPLY TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.**

Petitioner asks this Court to remand this case for further consideration in light of this Court's ruling in Austin v United States, 509 U.S.____; ____ S. Ct. ___ ; _____ L.Ed.2d _____; 53 CrL 2274 (1993). Respondent maintains that a remand is not proper under the circumstances. First, Petitioner failed to raise any Eighth Amendment issue in the courts below. Respondent further maintains that a remand is not required because the instant case presents a different theory of recovery under the narcotic forfeiture statute than the recovery theory presented in Austin. Finally, the Eighth Amendment's prohibition

on excessive fines has not been found to apply to the States through the Fourteenth Amendment.

In its appeal to the Michigan Court of Appeals and to the Michigan Supreme Court, Petitioner did not raise any state or federal Eighth Amendment challenges to the scope of the trial court's order of forfeiture; thus, no Eighth Amendment challenge based upon the federal Constitution was passed upon in state court. It is clear that any generic reference to a claimed constitutional violation is not sufficient to preserve a constitutional claim based upon an unidentified constitutional provision.

> At the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in

> the manner required by the state law. Bankers Life & Casualty Co. v Crenshaw, 486 US 71; 100 LEd2d 62, 72; 108 SCt 1645 (1989), *citing* Webb v Webb, 451 US 493, 501, 68 L Ed 2d 392, 101 S Ct 1889 (1981).

The Crenshaw Court also cautioned that accepting an Eighth Amendment claim that was not raised in the state courts becomes especially problematic when the state Constitution contains its own Excessive Fines Clause. Crenshaw, 100 L Ed 2d, supra at 72. Michigan's Constitution reflects in pertinent part the following: "Excessive bail shall not be required; excessive fines shall not be imposed...." Const. 1963, Art 2, Section 15. Petitioner admits that the excessive fines argument was not raised below. Therefore, this Court need not consider it.

This Court also need not remand this case as a result of the Austin decision because the facts of Austin are inapposite

to the facts of the instant case. In that case, Austin brought two ounces of cocaine from the mobile home to a body shop in order to consummate a prearranged sale to another individual. The sale was accomplished and a search warrant was executed at the body shop and mobile home the following day. As a result of that warrant, small amounts of marijuana, cocaine, a weapon, drug paraphernalia and approximately $4,700 in cash was recovered. Austin pled guilty to one count of possessing cocaine with intent to distribute in the state court. A federal forfeiture Complaint was filed pursuant to 21 U.S.C. 881(a)(4) and (a)(7) which sets forth that conveyances and real property shall be forfeit if it is used to facilitate a narcotic transaction. The government sought forfeiture of the mobile home and the business which was granted by the trial court.

The facts of the instant case are inapposite because the government sought forfeiture of items which were purchased with narcotic proceeds. At trial there was a stipulation of the tracing of the money allegedly obtained from the WILSON lawsuit which was used to purchase almost all of the various defendant items. The defense proffered that the source of the funds used to purchase these items and the funds which were contained in the various bank accounts constituted the settlement from the lawsuit. These facts are distinctly different than those presented in Austin. Respondent prevailed at trial in establishing that these funds were garnered from narcotic trafficking. Without the drug money, Petitioners would not have been in possession of the over one million dollars found in their residence. The drug talley sheets supported Respondent's theory as well

as the theory that the money which was found in the suitcases were to be taken to New York in payment for the sold cocaine. There was visible cocaine residue on the money and additional cocaine residue was recovered for chemical analysis. The trial court found, affirmed by the Court of Appeals, that Respondent had met the requisite burden.

A "proceeds" forfeiture is conceptually different from a facilitating theory. By definition, proceeds do not constitute an excessive fine since the narcotic dealers are in possession of items purchased with illgotten money. "Proceeds" are traceable entirely to criminal activity. Removing criminal proceeds from a culpable owner is no different than taking bank robber proceeds from a bank robber. The culpable owner is put into the precise position he or she would be in if no crime had been committed. Therefore, a remand as

a result of Austin is not required because the forfeiture in the instant case was based primarily on a "proceeds" theory rather than a "facilitation" theory. Property forfeit because they constitute narcotic proceeds are significantly different than property forfeit because it was used to facilitate a narcotic transaction.

Finally, in order for Austin to be applicable when the forfeiture is based upon a state statute, several antecedent questions have to be answered. Austin reviewed a federal forfeiture statute. This Court has not held that the Excessive Fines Clause of the Eighth Amendment applies to the States through the Fourteenth Amendment. Browning-Ferris v Kelco Disposal, 492 US 257, 106 L Ed 2d 219, 239 fn.22, 109 S Ct 2909 (1989). Any remand, then, would be premature because the applicability of the Eighth Amendment at the state level has not yet been determined.

II. **THE PETITIONERS WERE NOT DENIED A FAIR TRIAL ON THE BASIS OF AN ALLEGED LACK OF JUDICIAL IMPARTIALITY.**

This Court should not grant the petition on this basis. Petitioners made this claim through numerous vehicles including the following: pretrial motions before the trial judge; pretrial review of the trial judge's denials before the chief judge of the Circuit Court; mid-trial motions; appeals to the Michigan Court of Appeals; application for appeal before the Michigan Supreme Court. All of the Petitioners' requests were denied.

Petitioner's primary claim rests upon an alleged showing of an "indirect financial interest" by virtue of a letter sent by the trial judge. With this argument, the Petitioner is stretching the statutory proscription against a pecuniary interest in the outcome of the case. The

Court of Appeals summarily dismissed Petitioner's claim by noting that an ambition to fight the war on drugs does not translate into the inability of the court to decide a case fairly. Michigan's narcotic forfeiture statute, MCL 333.7524a; MSA 14.15(7524a) also required the court to keep records.

Moreover, Petitioner's suggestion that a trial judge is unable to be impartial because of a reference to the "scourge of drugs" is absurd. Most people are against drugs. This is not a new concept. To accept Petitioner's logic would result in the automatic exclusion of every judge who once found a defendant guilty. The letter does not establish actual bias or prejudgment as required by Michigan court rule and case law.

The Court of Appeals properly noted that a careful review of the entire record, rather than a selective review, reveals that Petitioners were not denied a fair trial. The Court properly noted:

> After carefully reviewing the entire record in this case, we conclude that reversal is not warranted on this basis. It appears that throughout the trial the atmosphere was rather tense as a result of the bickering between counsel and between claimants' counsel and the trial court. It appears to us that claimants' counsel provoked the trial court with their comments and conduct in general. In addition to being disrespectful to the court in many instances, claimants' counsel resorted to attacking a prosecutor by apparently stating that her conduct 'typified the basest kind of projection as described in psychiatric literature.' This type of conduct was uncalled for. The trial judge also appeared to be agitated by the tactics of claimants' counsel, such as what appeared in the judge's eyes to be attempts to create appellate parachutes and reliance on what clearly appears to be a fraudulent lawsuit as an explanation for some of claimants' extensive assets. As a result, the judge was apparently becoming frustrated and was losing

his patience. In re Forfeiture of $1,159,420, 194 Mich App 134, 154; 486 NW2d 326 (1992).

Finally, Petitioner claims that there is a "conflict" with this Court's decisions and those of the lower federal courts. The cases cited by Petitioner, however, fail to support their claim. The Petitioners were not denied a fair trial on this basis.

III. **IT IS PROPER FOR A TRIAL COURT TO DECLINE TO REVISIT A FRANKS V DELAWARE ISSUE IN A STATE FORFEITURE TRIAL WHEN THE PRECISE ISSUE WAS RAISED AND DECIDED UPON WITHIN THE CONTEXT OF A FEDERAL CRIMINAL TRIAL OF ROBERT HAWKINS.**

ROBERT HAWKINS was charged criminally in the Federal court system. PAMELA HAWKINS was not charged with any crimes. The narcotic forfeiture action was filed under the state narcotic forfeiture law.

At the federal criminal trial, ROBERT HAWKINS raised an issue under Franks v Delaware, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). The affiant, Jerome Sharpe, on the search warrant testified extensively at the federal criminal trial. The affiant's information was based in part on information from a confidential informant. That confidential informant, Randy Ulmer, testified at the federal

criminal trial and was cross examined at length by the defense. At the close of the government's case, the defense requested that the items recovered from the residence of ROBERT HAWKINS be suppressed and relied upon Franks. The federal trial court denied the request after having heard all of the testimony.

Similarly, the Franks issue was raised within the context of the state forfeiture civil lawsuit. Once again, the HAWKINS requested that the search warrant be suppressed on the basis that the affidavit contained deliberately false statements or statements made in reckless disregard for the truth, a violation under Franks v Delaware, supra. Michigan has adopted federal law when similar claims are brought at the state level. People v Turner, 155 Mich App 222, 227; 399 NW2d 477 (1986), lv

den 427 Mich 854 (1986); People v Poindexter, 90 Mich App 599; 282 NW2d 411 (1979), lv den 407 Mich 876 (1980); People v Ward, 107 Mich App 38; 308 NW2d 664 (1981), lv den 417 Mich 938 (1983).

The Michigan Court of Appeals properly ruled that collateral estoppel precluded the relitigation of the Franks issue. The doctrine of collateral estoppel has long been employed throughout the judicial system and applies to criminal cases as well as civil matters. Ashe v Swenson, 397 US 436; 90 SCt 1189; 25 LEd2d 469 (1970). Application of this principle requires several findings. First, the same ultimate issues underlying the first action must be involved in the second action. Parklane Hosiery Co. v Shore, 439 US 322; 58 LEd2d 552; 99 SCt 645 (1979). The issue raised in the federal court was identical to the issue raised in the forfeiture trial.

Secondly, there must be "mutuality" of parties. Parklane, 58 LEd2d at 560. The respective litigants in the second lawsuit were parties or privy to a party to the first lawsuit. The interests of ROBERT HAWKINS in the first lawsuit were adequate to protect the interests of his wife and children. Because of the spousal relationship, ROBERT HAWKINS' interests were so closely aligned with PAMELA HAWKINS' interests as to be her virtual representative.

Most importantly, even though the trial court in the instant action declined to revisit the Franks issue in the civil forfeiture action, the underlying allegations proffered by Petitioners, that is, that there were deliberate false statements by both the affiant and the confidential informant, were presented as an affirmative equitable defense. Both the

affiant and the confidential informant were questioned at length during the forfeiture trial regarding their statements set out in the search warrant. Thus, the precise issue was nevertheless presented, argued and rejected once again by a trial court. On this basis there was no error.

RELIEF

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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